CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 213.

MARY AMIS QUINLAN, EXECUTRIX,

vs.

GREEN COUNTY, KENTUCKY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FILED FEBRUARY 28, 1906.

(20,110.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 10, 1906.

1 No. 1440.

United States Circuit Court of Appeals, Sixth Circuit.

MARY AMIS QUINLAN, Ex'tr'x, Plaintiff in Error,
v.
GREEN COUNTY, KENTUCKY, Defendant in Error.

Error to the Circuit Court of the United States for the Western District of Kentucky.

This was an action upon certain bonds and coupons purporting to have been issued by Green county, one of the counties of the State of Kentucky. The parties stipulated upon the record to waive a jury and submit the issues of fact and law to the court.

The court upon all of the evidence made the following finding of facts and law:

Finding of Fact.

1. The court finds that the plaintiff is a citizen of the state of New York and was so when this action was instituted on the 28th day of March, 1899, and that the plaintiff was then the *bona fide* holder for value of the bonds and coupons sued on, and fully entitled to sue the defendant thereon in this court.

2. That the Cumberland & Ohio Railroad Company was a corporation organized and existing under the laws of the state of Kentucky, with power to receive a subscription to its capital stock from the defendant, Green County, and said county was authorized conformably to law to make a subscription to said capital stock and to pay for the same in the bonds of said county.

3. That on June 17th, 1869, there was, as appears from the records thereof, presented to the Green County Court by the commissioners of said railroad company the following request:

2 "We, the undersigned, commissioners of the Cumberland and Ohio Railroad Company, hereby request that the County Court of Green County submit to a vote of the qualified voters of said county the question, 'Whether said court shall subscribe for and on behalf of said county, and in pursuance of the provisions of the charter of said railroad company, two hundred and fifty thousand dollars to the capital stock of said company, payable in the bonds of said county, having twenty years to run and bearing six per cent. interest from date, upon the condition that said company shall locate and construct said railroad through Green County and within one mile of the town of Greensburg in said county, and shall expend the amount so subscribed within the limits of Green County; and also upon the further conditions that said bonds shall not be issued or said county pay any part of either principal or interest on said amount subscribed as aforesaid until said county of Green shall be fully and completely exonerated from the payment of the capital stock sub-

scribed for by the County Court of said county for and on behalf of said county to the Elizabethtown and Tennessee Railroad Company."

4. That on the same day, namely, on June 17th, 1869, the County Judge of Green County, acting alone and as the County Court, entered an order in the said court in the following language:

"Present, Thos. R. Barnett, Judge.

"Whereas the Commissioners of the Cumberland and Ohio Railroad Company by virtue of the authority delegated to them by the charter of said company, have requested the County Court of Green County to order an election in the said county of Green, and to submit to the qualified voters of said county the question whether said county court shall subscribe for and on behalf of said county, two hundred and fifty thousand dollars to the capital stock of the Cumberland and Ohio Railroad Company, and payable in the bonds, of said county, having twenty years to run and bearing six per cent. interest from date, and upon condition that said company shall locate and construct said railroad through the said county of Green, and within one mile of the town of Greensburg, in said county, and shall expend the amount so subscribed within the limits of Green County; and also upon the further condition that said bonds shall not be issued or said county pay any part of the principal
3 or interest on said amount subscribed to said Cumberland and Ohio Railroad Company, until said county of Green is fully and completely exonerated from the payment of the capital stock voted by said county, and authorized to be subscribed by said Green County Court to the Elizabethtown & Tennessee Railroad or any part of the interest thereon. It is therefore, ordered by the court that an election by the qualified vote-s of Green county, at the voting places in said county, be held and conducted by the several officers as prescribed by law for holding elections, on the third day of July, 1869, to vote on the question as to whether or not the said county court shall for and on behalf of said county subscribe two hundred and fifty thousand dollars to the capital stock of the said Cumberland & Ohio Railroad conditioned and to be paid, as above stated."

5. That at the election held pursuant to said order there were cast in favor of said proposition and subscription a majority of the votes of the qualified voters of said county, and this fact, upon being duly ascertained, was certified by the proper officers as required by law.

6. That on the third day of June, 1870, the County Judge of said county, acting alone and as the county court of said county, entered an order in said court as follows:

"Present, Thomas R. Barnett, Judge.

"Whereas, in pursuance of an order of this court made on the 17th day of June, 1869, an election was held in said county of Green, on the third day of July, 1869, at the several precincts of said county, and it appearing that a majority of the qualified voters at said election decided that the county of Greene should subscribe for two hundred and fifty thousand dollars of the capital stock of the Cumberland & Ohio Railroad Company; now it further appearing that said election was held in conformity with the law, and in accordance with the provisions of the charter of said company, now, therefore, I

Thomas R. Barnett, the presiding judge of the Green County Court, by virtue of the authority in me vested by law, and to carry out the wishes of said voters, do hereby subscribe for two hundred and fifty thousand dollars of the capital stock of said Cumberland and Ohio Railroad Company, for and on behalf of said county of Green, which subscription is to be paid in the bonds of said county as prescribed in said order of submission, and this subscription is made with
4 the conditions set out in the order of this court, ordering said election and now of record in the office of this county."

7. That on the 12th day of October, 1871, the said county Judge of said county, acting alone and as the county court of said county, entered an order in said court in the following language:

"Present, Thomas R. Barnett, Judge.

"On motion of E. H. Hobson, Director of the Cumberland and Ohio Railroad, it is ordered that Z. F. Smith, President of the Cumberland and Ohio Railroad, be, and he is hereby authorized to have printed for the county of Green the bonds to the amount of two hundred and fifty thousand, dollars, the amount of the subscription of Green county to the said railroad, in the following denominations, to-wit, the same to be conditioned as specified in the order submitting the vote of the said county;

"125 bonds at $1000	$125,000 00
"200 bonds at $500	100,000 00
"250 bonds at $100	25,000 00
	$250,000.00

8. That pursuant to all that was done, as aforesaid, the defendant, Green County, issued and delivered to the said Cumberland & Ohio Railroad Company $250,000 of its bonds of the description aforesaid except that the said conditions were not stated therein, in payment of said subscriptions to said capital stock, and thereupon there was delivered to said county in payment thereof, and said county received, and has ever since held and owned, the certificates of the said railroad company for the 2500 shares of $100 each of its capital stock so paid for by said bonds.

9. That the $47,509 of bonds and coupons sued on in this action were part of the bonds thus issued and delivered to said railroad company in payment for said stock.

10. That while the proposed line of said railroad was located through said county from its northern line to its southern line, and within one mile of Greensburg, yet that only about five miles of said railroad has ever been constructed or attempted to be constructed in said county, the part thus constructed extending from the northernmost line of said county to the town of Greensburg, the countyseat; which town is located about fifteen miles from the southernmost line of the county and about as distant from any other line of the county except the northern line.

5 11. That only $150,000 of the bonds thus issued, or the proceeds thereof, were expended within the limits of Green county. No other part of said bonds was expended in said county.

12. That with said $150,000 of said bonds the grading, bridging and tunneling on the track of said railroad was done and paid for over the five miles aforesaid, but no further, and when this was done, the work on the railroad was suspended for some years. Afterwards the rails and ties and superstructure generally were put upon the track theretofore graded and the railway was completed from the northernmost line of the county to Greensburg under the terms of its lease, by the Louisville & Nashville Railroad Company at its own expense, and not with any of the bonds issued as aforesaid by the defendant.

13. That on the 15th day of August, 1872, at a called term of the Green County Court, over which Thomas R. Barnett, County Judge, presided, and no justice of the peace being present, the following order was entered by said court:

"Present Thos. R. Barnett, Judge.

"Application was this day made to the presiding judge of the County Court of Green county, by the President and Board of Directors of the Cumberland and Ohio Railroad Company to issue the balance of the bonds of said county to the amount of the subscriptions of said county of Green to said Cumberland & Ohio Railroad Company, and the court being sufficiently advised, it is ordered by the court that the balance of said bonds be and they are hereby ordered to be issued, the same to be signed by the judge of said county court of Green county, and countersigned by the clerk of said court, as required by the charter of said company."

14. That except as to the number of the bonds and the amount agreed to be paid therein the bonds sued on were each of the following; namely:

"UNITED STATES OF AMERICA,
County of Green, State of Kentucky:

$500.00.

For the Cumberland and Ohio Railroad.

"Twenty years after date, the county of Green, in the state of Kentucky, will pay to the holder of this bond the sum of five hundred dollars with interest thereon at the rate of six per cent. per annum, payable semi-annually upon presentation of the proper coupons hereto attached, the principal and interest being payable at the Bank of America, in the city of New York.

6 "In testimony whereof, the Judge of said county of Green has hereunto set his hands and affixed the seal of said county, on the first day of April, A. D. 1871, and caused the same to be attested by the county clerk, who has also signed the coupons hereto attached.

"(Green County Seal.)

"T. R. BARNETT, *Judge.*
"D. T. TOWLES, *Clerk.*"

As appears on the face of each of said bonds there was no recital therein of any of the facts herein found to be true.

15. That the plaintiff knew when he purchased the bonds sued on that the railroad had not been constructed in Green county otherwise than as herein found to be the fact, namely, from the northern line of said county to the town of Greensburg, but no further.

16. That in the year 1868, upon a proposition therefor being submitted to the vote of the qualified voters of Green County, the majority of said qualified voters voted in favor of a proposition to subscribe for $300,000 of the capital stock of the Elizabethtown & Tennessee Railroad Company, and upon the said result of the election being properly ascertained and certified the county judge of Green county, sitting alone and as the county court of said county, made and entered of record in said court the following orders:

1868.

"Green County Court, May Called Term, 1868, 20th Day of May.

Present, T. R. Barnett, Judge.

"This day T. R. Barnett, Presiding Judge, and D. T. Towles, Clerk of the Green county court, this day produced their certificate in words and figures as follows, viz: We, T. R. Barnett, Presiding Judge, and D. T. Towles, Clerk of the Green county court, duly authorized to compare the Poll Book of Green county, certify that an election — held in said county at the various voting places in said county, on the 16th day of May, 1868, on the question whether the county court of Green county shall, for and on behalf of said county subscribe for three thousand shares in capital stock of Elizabethtown & Tennessee Railroad Co. to be paid for in the bonds of said county, payable in twenty years and bearing six per cent. interest payable semi-annually in the city of New York, with interest coupons attached thereto, and that 586 votes were cast for said subscription and 204 against said subscription.

May 20th, 1868.

7 "T. R. BARNETT.
"D. T. TOWLES.

"It is therefore ordered by the court that the said vote be, and is now, entered of record, as follows, to-wit: 585 votes cast for said subscription and 204 votes were cast against said subscription, showing that there is a majority for said subscription of three hundred and eighty-two votes.

"It is now, therefore, ordered that the clerk of this court, for and on behalf of the county of Green, make said subscription on the terms specified in the order submitting the question to a vote as aforesaid."

17. That no formal or express exoneration of said county from the payment of said last named subscription was ever made or attempted, but nothing further has, up to this date, ever been done in respect to it, and neither bonds by the county nor stock by the said last

named railroad company, have ever been issued or delivered in execution of said orders or under the terms of said subscription.

Upon consideration of the facts hereinbefore found to be true, and of the opinion of the Court of Appeals, in the case of J. D. Shortell *v.* Green County, the court, in deference to said opinion, has reached the following:

Conclusions of Law.

1. That the plaintiff is not entitled to recover because the conditions upon which the subscription for the capital stock of the Cumberland & Ohio Railroad Company was made and upon which the bonds sued on were issued have not been performed or complied with, and

2. That the failure to recite in the bonds any of the facts herein found to be true, or any of the conditions upon which the bonds were issued, is immaterial as against the defense that there was a failure to perform the said conditions.

Judgment.

In consideration of the premises it is considered and adjudged by the court that the plaintiff's petition be and it is dismissed and that the defendant recover of the plaintiff its cost herein expended, and it may have execution therefor. To this judgment and to each part of it the plaintiff excepts.

8 Upon the facts thus found and determined the plaintiff's petition was dismissed. The plaintiff thereupon sued out this writ of error.

This court desires the opinion and direction of the Supreme Court in respect to certain questions of law arising upon the finding of facts herein set out and accordingly certifies to the Supreme Court the following interrogatories:

1st. Do the facts found by the Circuit Court conclude or estop the county from denying liability to the plaintiff upon the bonds and coupons in suit, by reason of non-compliance with the terms and conditions imposed by the favorable vote of the county authorizing a subscription to the stock of the Cumberland and Ohio Railroad Company and the issuance of bonds in payment therefor? Or, if this question should be deemed too broad, then,

2nd. Assuming the facts to be as found, was a *bona fide* purchaser before maturity of these bonds and coupons for value, entitled to assume in his purchase that Green County had before their issuance been "fully and completely exonerated from the payment of the capital stock subscribed for by the County Court of said county for and in behalf of said county to the Elizabethtown and Tennessee Railroad Company?"

HORACE H. LURTON,
HENRY F. SEVERINS,
J. K. RICHARDS,
Circuit Judges.

9 United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA, *Sixth Judicial Circuit, ss:*

I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing certificate and statement of facts in the case of Mary Amis Quinlan, Executrix, *vs.* Green County, Kentucky, was duly filed and entered of record in my office by order of said Court, and as directed by said Court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 19th day of February, A. D. 1906.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk of United States Circuit Court
of Appeals for the Sixth Circuit.

Endorsed on cover: File No. 20,110. U. S. circuit court appeals, 6th circuit. Term No. 213. Mary Amis Quinlan, executrix, *vs.* Green County, Kentucky. (Certificate.) Filed February 28th, 1906. File No. 20,110.

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CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1906.
No. 213.

MARY AMIS QUINLIN, EXECUTRIX OF LEONARD G. QUINLIN, DECEASED, - - *Plaintiff in Error,*

vs.

GREEN COUNTY, KENTUCKY, - *Defendant in Error*

BRIEF FOR PLAINTIFF IN ERROR.

EDMUND F. TRABUE,
GEORGE DURELLE,
For Plaintiff in Error.

JOHN J. MCHENRY,
JOHN C. DOOLAN,
ATTILLA COX, JR.,
Of Counsel,

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 213.

MARY AMIS QUINLIN, EXECUTRIX OF
LEONARD G. QUINLIN, DECEASED, - *Plaintiff in Error*,

VS.

GREEN COUNTY, KENTUCKY, - - *Defendant in Error.*

BRIEF FOR PLAINTIFF IN ERROR.

This case is here on CERTIFICATE from the United States Circuit Court of Appeals for the Sixth Circuit, propounding the following questions, *to-wit:*

1st. Do the facts found by the Circuit Court conclude or estop the county from denying liability to the plaintiff upon the bonds and coupons in suit, by reason of non-compliance with the terms and conditions imposed by the favorable vote of the county authorizing a subscription to the stock of the Cumberland & Ohio Railroad Company and the issuance of bonds in payment therefor? Or, if this question should be deemed too broad, then,

2nd. Assuming the facts to be as found, was a *bona fide* purchaser before maturity of these bonds and coupons for value, entitled to assume in his purchase that Green County had before their issuance been "fully and completely exonerated from the payment of the capital stock subscribed for by the County Court of said County for and in behalf of said county to the Elizabethtown & Tennessee Railroad Company?"

On February 24, 1869, in furtherance of a project to build a railroad traversing the State of Kentucky, the Kentucky legislature passed an act to incorporate the Cumberland & Ohio Railroad Company, by which act each of the various counties in which the road was expected to run was authorized to subscribe stock in the company, and to issue bonds in payment of such subscription, after submitting the question of the subscription to the vote of the qualified voters of such county. (Acts 1869-70, Vol. 2, pp. 225-231.) The section of this act which is involved in this litigation is as follows:

"Sec. 15. That any city, town, or county through which said proposed road shall pass, is hereby authorized to subscribe stock in said railroad company in any amount any such city, town, or county may desire; and the county court of any such county is authorized to issue the bonds of their respective counties in such amount as the county court may direct; and the chairman and board of trustees, or mayor and aldermen of any town, and the mayor and aldermen or council of any city, are hereby authorized to issue bonds of their respective towns or cities in like manner. *All said bonds shall be payable to* BEARER, with coupons attached, bearing any rate of interest not exceeding six per cent. per annum, *payable semi-annually in the city of New York*, payable at such times as they may designate, not exceeding thirty years from date; but before any such subscription on the part of any town, city or county shall be valid or binding on the same, the mayor and aldermen or chairman and board of trustees of any town, the mayor and aldermen

or council of any city, and the county court of any county, having jurisdiction, shall submit the question of any such subscription to the qualified voters of such city, town or county, in which the proposed subscription is made, at such time or times as said chairman and board of trustees, or mayor and aldermen of any town, mayor and aldermen or council of any city, or the county court of any county, as aforesaid, may, by order, direct; and should a majority of the qualified voters voting at any such election vote in favor of subscribing said stock in said railroad company, it shall be the duty of such county court, trustees, or other authorities aforesaid, to make the subscription in the name of their respective cities, towns or counties, as the case may be, and proceed to have issued the bonds to the amount of such subscription as hereinbefore directed; and the mayor and aldermen, or chairman and board of trustees of any town, mayor and council or aldermen of any city, or the county court having jurisdiction in any such county that may subscribe for stock in said railroad company, are hereby authorized and required to levy annually and collect a tax upon the taxable property in their respective cities, towns or counties, as listed and taxed under the revenue laws of this State, a sum sufficient to pay the interest on said bonds as it accrues, together with the cost of collecting same. They are also authorized and required to make provision for paying said bonds at their maturity; and to enable them to do this, they may establish a sinking fund, and loan out the same at any rate of interest they can obtain, and, if necessary, collect the same by law, or may adopt such

other means as to them may seem proper and expedient; and may levy and collect taxes annually or otherwise on the property aforesaid for this purpose. The person collecting said tax shall give tax receipts for the same; and any taxpayer paying tax to said road under the provisions of this act, shall be entitled to stock in said railroad company to the amount of taxes he may pay; and the cities, towns or counties, under whose subscription the tax is levied, shall be divested of stock to the extent of stock issued on said tax receipts; and whenever such receipts to the amount of one share or more shall be presented to the company, or an officer or agent designated by it, certificate stock shall be issued for a fractional part of a share: Provided, That the said cities, towns or counties shall receive no dividends on their stock, but the holders of stock issued on said receipts as aforesaid shall be entitled to the same dividends, and to all the rights and privileges as the original and cash stockholders: And Provided, further, That said company may, in any way that may seem expedient to it, provide for and pay, each or any year, to the cities, towns or counties, or any of them, the amount of tax levied by reason of said bonds, and thus stop the collection of tax for that year: And Provided, further, That the company may purchase said bonds and surrender them at any time to the cities, towns or counties issuing them, and have the same canceled; and the mayor and council or aldermen of any city, or the mayor and aldermen or chairman and board of trustees of any town, or the county court of any county having jurisdiction, may

appoint collectors for said tax, or may require the sheriffs or marshals of the respective cities, towns, or counties, within the jurisdiction of the same, to collect the said tax, all of whom shall have the same powers and remedies, and shall proceed in the same way for the collection of said tax, as the sheriffs in the collection of the State revenue. The mayor and aldermen, or chairman and board of trustees, shall require and take from the person collecting the tax a bond, with sufficient sureties, conditioned as they may think best. If the collections are made by the sheriff or marshal, they shall settle and pay over the tax at the same time that sheriffs are required to pay the State revenue; and for their services in collecting they shall in no case be allowed more than three per cent. commission on the amount collected. *That, if preferred, the application herein authorized to be made to the county court, may be made to the presiding judge of the county court; and all the powers herein given to the county court are hereby vested in the presiding judge of the county court.* At all meetings of the stockholders for the purpose of electing officers, or any other purpose, the said towns, cities and counties may, by proxies duly authorized by the authorities thereof, cast a vote for each share of stock so subscribed by said town, city, or county: Provided, That whenever certificates of stock shall be issued to persons residing therein for taxes paid, the stock represented by such certificates shall be deducted from the stock represented and voted for by said proxies; and said taxpayers shall be entitled to one vote for each certificate so issued to them repre. senting one share of stock." (Italics ours.)

Under this power application was made to the presiding judge of the Green County Court by the Railroad Commissioners, as provided for in the section, for a submission to the popular vote of the question of subscribing two hundred and fifty thousand dollars to the capital stock of the railroad company. Now, it appears that in the year previous the question of a subscription to the capital stock of another projected railroad, the Elizabethtown & Tennessse Railroad Company, had been submitted to the vote of the people of Green County, and they had voted in the affirmative, and an order had been entered in the Green County Court directing the clerk of the court, for and on behalf of the County of Green, to make said subscription. It is evident that the project of the Elizabethtown & Tennessee Railroad Company had fallen through and been abandoned, for the clerk never made or attempted to make any subscription, and almost immediately thereafter there arose a litigation between the Mercer County Court and the Kentucky River Navigation Company, as to whether such an order as that made as to the subscription of stock in the Elizabethtown & Tennessee Railroad Company was void. Furthermore, the application for subscription to the Cumberland & Ohio contained a provision that the county should be exonerated from the payment of capital stock in the Elizabethtown & Tennessee Railroad Company. The submission to the vote of the people contained a like provision and the order of subscription referred to this condition.

The order submitting the Cumberland & Ohio subscription to the vote of the people shows that the authorities of Green County did not recognize the action previously taken as a subscription for stock of the Elizabethtown &

Tennessee Railroad, for it provides that the bonds for the Cumberland & Ohio subscription shall not be issued until said County of Green is fully and completely exonerated from the payment of the capital stock voted by said county, *and authorized to be subscribed* by said Green County Court, to the Elizabethtown & Tennessee Railroad. The vote upon the Cumberland & Ohio subscription was favorable, and the presiding judge of the County Court entered an order of subscription not directing the subscription to be made, but *subscribing* for the stock of the Cumberland & Ohio. Afterwards the litigation between the Mercer County Court and the Kentucky River Navigation Company reached its conclusion in the Court of Appeals of Kentucky, and an order exactly similar to the one made in the Green County Court relative to a subscription for the stock of the Elizabethtown & Tennessee Railroad was held to be absolutely void. (*Mercer County Court vs. Ky. River Navigation Co., 8 Bush, 300.*) Afterwards the bonds of the County of Green were printed, issued and delivered to the agents of the Cumberland & Ohio Railroad.

From the findings of facts it appears that plaintiff's intestate was the *bona fide* holder for value of the bonds and coupons sued on (*finding 1, p. 1*) when he purchased them; but knew that the railroad in question had not been constructed, except to the extent found by the circuit judge (*finding 15, p. 5*).

It appears that the bonds sued on, $47,509.00, were part of an issue of $250,000.00 (*findings 8 and 9, p. 3*); that these bonds were issued in payment of a subscription by Green County to the capital stock of the railroad company, and that the certificates for the entire stock have ever since the issu-

ance of the bonds been held and owned by the county (*finding 8, p. 3*); that the bonds were delivered in 1872, before the road was built (*p. 4*).

It appears that the railroad company had power to receive the subscription to its stock from Green County, and that the request for the subscription was made June 17, 1869, and that on said day the county judge, acting alone and as the County Court, entered the order submitting the question of subscription to the qualified voters of the county; that an election was held July 3, 1869, resulting in a favorable vote, and the subscription made accordingly, June 3, 1870 (*findings 2 to 5 inclusive, pp. 1 and 2*); that October 12, 1871, the county judge, alone and as the court, ordered printed the entire issue of bonds necessary to pay the county subscription aforesaid, and that the bonds were issued accordingly and delivered to the railroad company.

It appears that a condition of the subscription was that the company should locate and construct its railroad through Green County and within one mile of Greensburg in said county and expend the amount subscribed as aforesaid within the limits of the county; also upon further condition that the bonds should not be issued or the county pay any part of principal or interest thereof until the county should be fully and completely exonerated from payment of the capital stock voted by said county and "*authorized to be subscribed*" to the Elizabethtown & Tennessee Railroad, and that only $150,000 of the bonds issued or proceeds thereof were expended within the limits of the county, said amount being expended in grading, building and tunnelling on five miles of railroad, when the work was suspended for years, and afterward completed to Greensburg by the Louisville &

Nashville Railroad Co., at its own expense, under terms of its lease from the railroad company aforesaid, and not with any of the bonds issued as aforesaid, and that said road was never constructed through Green County except from the northern limit to Greensburg, about one-third of the distance from its northern to its southern limit.

It appears that no formal exoneration of the county from the subscription authorized to the Elizabethtown & Tennessee Railroad was ever made or attempted, but that nothing has ever been done in respect of it and neither bonds nor stock ever been issued under it.

Upon the facts thus established, the Circuit Court, in deference to the decision of the Court of Appeals of Kentucky in J. D. Shortell vs. Green County (116 Ky. 108), held in favor of defendant.

ARGUMENT

I.

Exonerations from E. & T. R. R. Co. " ."

We shall consider the interrogatories in inverse order. The Circuit Court does not find (page 5) that the county was not exonerated from the supposed subscription to the stock of the Elizabethtown & Tennessee Railroad Company; *e contra* it finds (No. 17, page 5) that, although there was no express exoneration, nevertheless nothing had ever been done in respect to the subscription and neither bonds nor stock issued under it nor under the orders of court respecting it.

The defense based upon this point is absolutely without merit. The Circuit Court finds, as aforesaid, that the subscription project was abandoned both by the county and

the railroad company, and nothing done under it in the thirty-eight years that had elapsed since the vote on it was taken. What greater practical exoneration could exist is next to inconceivable.

The legal exoneration, however, is as complete as the practical, for it not only appears upon the order itself (p. 2) that it is void, but it is demonstrable from the record that the County Court treated it as void, and upon the strength of its invalidity made the order of subscription of June 3, 1870, to the stock of the Cumberland & Ohio Railroad Company (pp. 2, 3).

The ground of invalidity of the attempted subscription to the stock of the Elizabethtown & Tennessee Railroad Company is elaborately expounded in *Mercer, etc., v. Navigation Co., 8 Bush, 300*, wherein the court held that any subscription, to be valid, must be contained in the order of the court, the court being able to *speak only through its records;* that accordingly the court's order appointing a commissioner to make the subscription upon compliance with the conditions thereof was void, and the subscription made accordingly was void. The court said concerning the order and the judgment in mandamus compelling levy of a tax,

> "This judgment cannot be sustained unless the action of the County Court, together with that of the commissioner, amounts in estimation of law to a complete and binding contract of subscription." (*P. 305.*)

It further said:

> "While acting together as a County Court, they (the justices) were authorized for and on behalf of

their respective counties to subscribe to the capital stock of the Navigation Company. County Courts, under the law, act and can act only through their orders made of record. By such orders so made the courts and those for whom they are legally authorized to act are bound." (*P. 306.*)

After citation of authorities the court proceeds:

"The agent, Thompson, was appointed without authority of law, and his acts cannot bind the tax-payers of Mercer County. Unless the orders of the County Court, made of record when a majority of the justices were present, amount of and within themselves, disconnected from any act done out of the court by anyone, or in court and not of record, to a perfect and complete subscription of stock, the award of the mandamus was erroneous," etc., etc. (*P. 307.*)

Obviously under this decision the order directing *the clerk to subscribe* to the stock of the Elizabethtown & Tennessee Railroad Company was void, and it is demonstrable from the record that it was so regarded by the County Court when the subscription was made to the stock of the Cumberland & Ohio Railroad Company, and so treated when the bonds were delivered.

In the order directing the clerk to subscribe, the court, after reciting the vote in favor of the subscription, declared:

"It is now, therefore, ordered that the clerk of this court, for and on behalf of the County of Green, make this subscription on the terms specified in the order so submitting the question to a vote as aforesaid."

The order contained no subscription. It did not declare that the county thereby *subscribed* for three thousand shares of the stock of the company, nor did it recite the conditions upon which the vote was taken. *It delegated to the clerk the duty of making the subscription and of seeing that it was done upon the conditions upon which the county had voted to make the subscription.* The order was, therefore, as clearly void as that in the case of *Mercer, etc., vs. Navigation Co., 8 Bush, 300 supra.*

Not only was the order void, but it was recognized by the County Court of Green County to be void, for when that court, June 3, 1870, one year and fourteen days afterward, subscribed to the stock of the Cumberland & Ohio Railroad Company it recited the election and its results and declared:

> "Now, therefore, I, Thomas R. Barnett, the presiding judge of the Green County Court, by virtue of the authority in me vested by law, and to carry out the wishes of said voters, do hereby subscribe for two hundred and fifty thousand dollars of the capital stock of said Cumberland & Ohio Railroad Company for and on behalf of the said County of Green, which subscription is to be paid in the bonds of said county as prescribed in the said order of subscription, and this subscription is made with the conditions set out in the order of this court ordering said election and now of record in the office of this court."

While, therefore, we find the court, on May 20, 1868, delegating to the clerk the delicate duty of subscribing to the stock of a railroad company upon the terms of the county vote *as he might be advised in regard thereto*, we find the

same court, June 3, 1870, making the subscription in the order itself.

True, the Court of Appeals had not made its decision in the Mercer County case June 3, 1870, but it is demonstrable from the action of the Green County Court, May 20, 1868, and June 3, 1870, that between those two dates the County Court had gotten light, doubtless from information of the litigation in the court below, or, possibly, argument in the Appellate Court, of the probable invalidity of the order of May 20, 1868. Accordingly, there is no provision, as the Kentucky court in *Shortell vs. Green Co., 116 Ky. 108 (April, 1903)*, seems to suppose, that any formal "release" is to be made, but the order for the vote simply provides the condition that the bonds shall not be issued, etc., "until "said County of Green is fully and completely exonerated "from the payment of the capital stock voted by said "county and ***authorized*** to be subscribed by said Green "County to the Elizabethtown & Tennessee Railroad, or "any part of the interest thereon." (Rec. p. 2.) It will be observed that nowhere is there any reference to any subscription to the stock of the Elizabethtown & Tennessee Railroad Company, but that this order is carefully drawn in such a manner as not even to imply that a subscription had been made, but only that a subscription had been "***authorized.***"

The order says nothing of any formal release, nor does it compel anybody to do any act, but simply forbids the bonds to be issued or the principal or interest thereof paid before the county's exoneration. Had the County Court intended to require any formal release from the subscription by the Elizabethtown & Tennessee Railroad Company nothing would have been easier than to so provide. But, as

aforesaid, the subscription had already been discredited, as is apparent from the contrast between the two orders aforesaid of May 20, 1868, and June 3, 1870, and it was, therefore, only necessary to require exoneration, howsoever obtained, before delivery of the bonds.

Accordingly, no bonds were delivered until after the Court of Appeals had finally settled the question evidently already mooted, *to-wit*, by the decision aforesaid made at the April term, 1871. It was only after that decision that the bonds were issued. Although the subscription was made June 3, 1870, the bonds were not even printed until October, 1871 (*p. 3*). They were printed upon request made October 12, 1871 (*p. 3*).

If, therefore, anything be demonstrable, it is demonstrable not only that the county was completely exonerated upon the issuance of the bonds, but that it was so understood by the County Court which withheld the issuance thereof until such exoneration.

Not only is this true, but the County Court was the judge of the exoneration and held the county to be exonerated. *Provident, etc., Co. vs. Mercer Co., 170 U. S. 593, 42 L. Ed. 1156.*

The order of subscription to the stock of the Cumberland & Ohio Railroad Company was made through the presiding judge of the County Court, but he acted as the County Court (*finding No. 4, p. 2, No. 6, p. 2.*) He was authorized so to act, for the statute under which the aid was voted so provided. The charter, *to-wit, Act of February 24, 1869*, incorporating the company, quoted *supra*, provided, *Sec. 15:*

> "That, if preferred, the application herein authorized to be made to the County Court, may be made to the

presiding judge of the County Court; and all the powers herein given to the County Court are hereby vested in the presiding judge of the County Court."

The result is that, although May 20, 1868, the Green County Court made a void order directing its *clerk* to make a subscription to the stock of the Elizabethtown & Tennessee Railroad Company, it avoided all the points of invalidity thereof in the orders of June 17, 1869, and June 3, 1870, and thoroughly understood wherein the invalidity of the first order lay, and what exoneration was necessary for the county's safety. Accordingly, the County Court determined that it was exonerated, and delivered the bonds which were not directed to be printed until October 12, 1871, as above indicated.

Consequently, we submit that there is neither legal ground for, nor any just merit in the defense based upon this point.

If instead of the condition aforesaid being simply for the county's exoneration it had been for procurement of some act of release, as inadvertently surmised in Shortell v. Green Co., 116 Ky. 108, nevertheless the decision in Mercer Co. v. Navigation Co., 8 Bush, 300, would have dispensed with the procurement of such release.

In *Rountree v. Hendricks, etc., 1 B. Mon.*, the covenant was to pay on condition that plaintiff procured his wife's relinquishment of dower, and he neither obtained her deed nor put her to death, but her dower was terminated by the act of God, and the court held the condition discharged and the covenant absolute.

Likewise in *Peart v. Taylor, 2 Bibb, 556*, where the contract required Taylor at his own proper charge and cost to survey and plat the lands in question and—

"to clear lands, build houses, plant orchards, and to do everything necessary to save and secure the said land according to the king's proclamation and the colonization act,"

it was held that Taylor was excused from performance by the repeal of the requirements of the king's proclamation and colonization act.

II.

Conditions of C. & O. R. R. Co.

The learned circuit judge, in his conclusions of law, *page 6*, expressly declares his finding to be "in deference to said opinion," *viz.*, opinion in *Shortell v. Green Co.*

Whatever might be the deference due from the Circuit Court to the State Court of last resort in a case of this kind, this court must form its independent opinion. If the question were evenly balanced, this court might "lean" toward the conclusion reached by the State Court, but nevertheless would form its independent opinion and make its independent judgment, regardless of a contrary decision reached by the State Court.

Burgess v. Seligman, 107 U. S. 20, 27 L. Ed. 359;
Folsom v. Township, 159 U. S. 611, 40 L. Ed. 278;
Stanly Co. v. Coler, 190 U. S. 437, 47 L. Ed. 1126;
Great Southern, etc., Hotel Co. v. Jones, 193 U. S. 532, 48 L. Ed. 778.

Of course, if the decision of the State Court of last resort preceded the issuance of the bonds so that they appeared invalid when issued, such decision would become

part of the law of property and be controlling upon the Federal Court, but in this case the Shortell decision, upon which the circuit judge predicated his judgment, *was made after the institution of this action.* The question is, accordingly, *res nova* with this court.

The contention of Green County is that the purchasers of the bonds actually issued by the county would obtain no right whatever under the bonds until the conditions of the subscription were complied with, *to wit*, the road constructed through the county within a mile of Greensburg, and the entire proceeds of the subscription spent in the county. This contention involves:

(a) That although the bonds were voted in aid of the construction of the road, nevertheless they could not be used in aid of its construction, but that the road must be constructed without the proceeds of the bonds, unless, forsooth, the purchasers chose to pay the price of the bonds and then await the result of the railroad company's operations in order to ascertain whether or not they should ever become entitled to the bonds;

(b) That although the means of building the road are the proceeds of stock subscriptions, the county might nevertheless take, vote, hold, and, if it chose, sell the stock subscribed for with only the contingent liability of paying the price, although it had issued its bonds to be sold in the open market for the highest price obtainable, in order that the proceeds of the bonds might be used in constructing the road;

(c) That the county should obtain the stock subscribed for, and should have a right to have the proceeds of its bonds issued in payment therefor expended in the county,

but that the bonds were either not to be delivered, or, if delivered, were not to become valid until it should afterward be determined whether or not the company were financially able to complete the road from the northern to the southern boundary of Green County, and expend the particular money received as proceeds of the bonds in that county;

(d) That although the county received the stock and made such disposition of it as it chose, *and although it delivered the bonds in payment therefor*, although it required that the bonds be sold and the proceeds expended in the county, nevertheless, if only $249,000, instead of $250,000, were so expended, and if the road were completed only nine-tenths or ninety-nine-hundredths of the distance from northern to southern boundary of the county, the purchasers of the county bonds should lose their entire investment and the county obtain the benefit of their money without obligation to pay anything therefor.

That the county did not so understand its subscription, but understood the contract of subscription to impose the conditions solely upon the railroad company, and not upon the bondholders, is proved by the verbiage of the order of subscription, and that the bondholders did not so understand it is proved by their purchasing and paying for the bonds; the order (*p. 2.*) declares the subscription "upon "condition that said company shall locate and construct "said railroad through the said County of Green within one "mile of the town of Greensburg in said county, and shall "expend the amount so subscribed within the limits of "Green County, and also upon the further condition that "said bonds shall not be issued or said county pay any part "of the principal or interest on said amount subscribed to

"said Cumberland & Ohio Railroad until said County of "Green is fully and completely exonerated from the pay-"ment," etc., of the Elizabethtown & Tennessee subscription.

The frame of this order demonstrates that the County Court understood how to make a *condition precedent* when it intended so to do. It forbade the bonds "to be issued" or the county to "pay any part of the principal or interest" until exonerated from the previous subscription, but made no such provisions as *conditions precedent* in respect of the construction of the road through the county or the expenditure of the proceeds of bonds within its limits, and any such provision would have been palpably absurd and suicidal.

The care with which this order was evidently framed indicates that the County Court fully understood the situation; and the verbiage of the order indicates the obvious intention to impose the conditions upon the company, and not upon the bondholders, except with reference to the exoneration from the subscription previously authorized to the Elizabethtown & Tennessee Railroad Company.

The order (*p. 2*) is carefully guarded in mentioning the stock as "voted" by the county and as "authorized to be subscribed" by the county, instead of speaking of the transaction as a subscription. It is also carefully guarded to forbid the "bonds" "issued" until the county's exoneration from the payment on account of the previous vote, etc. But when the order refers to the conditions concerning the location and construction of the road and expenditure of the money, it carefully provides that the conditions shall be that the "company shall locate and construct"

the road through the county within one mile of Greensburg and expend the amount so subscribed within the limits of Green County, thus imposing the condition upon the railroad company *and not making the performance of the conditions precedent to the issuance of the bonds*, as was done with reference to the county's exoneration from the previous vote for subscription. Indeed, so carefully is the order framed that the provision for the railroad company's constructing the road as designated, and expending the money as prescribed, precedes the condition concerning the exoneration of the county above mentioned, when, if it had followed instead of preceding such condition, the order would have required the road built as designated and the proceeds of the bonds expended as prescribed before "said bonds shall" "be issued."

It is consequently obvious that the order was carefully framed to avoid the inference that the construction of the road and expenditure of the money were conditions precedent to the issuance of the bonds.

Seeing, then, that the conditions in question were attached to the action of the company and not to the issuance of the bonds, it results that the bondholders have no concern with the conditions, nor the performance of the conditions, to locate or construct the road as designated or to expend the money as prescribed. If the railroad company failed to locate and construct the road, or to expend the proceeds of the bonds as agreed, the county would have its right of action for damages against the railroad company, or, peradventure, might procure its mandatory injunction for specific performance of its agreement. Such remedies would be appropriate to the county's relief, but to hold that

the construction of the road and expenditure of the proceeds of the bonds must precede the issuance or sale of the bonds is equally as preposterous as to hold that the road must be constructed through the county with the proceeds of the bonds before the bonds are issued or before the bonds shall become of any value.

The Kentucky Court in *Shortell vs. Green County*, *supra*, accordingly misapprehends the vital question involved. The question was not whether or not the bondholders were affected with notice of the non-performance of conditions invalidating their bonds, but whether or not the conditions attached to the railroad company or to the bondholders.

The question of recitals in the bonds *vel non*, and of estoppel by recitals, is not involved. Consequently, the real case is not concluded by the argument advanced by the Kentucky Court. That court seems to have understood the case to turn upon the question of notice to the bondholders of non-performance of the conditions of locating and constructing the road and expending the proceeds of the bonds, and accordingly the Kentucky court said (p. 125):

> "In determining this question, an important distinction is made by the authorities between those bonds which contain recitals certifying that the preliminary requisites for the issue of municipal bonds have all been complied with, and bonds containing no such recitals."

The "*preliminary* requisites for the issue of" the bonds were not the location and construction of the road, and expenditure of the proceeds of the bonds, but the exoneration of the county from the previous vote of aid to another railroad company. The expenditure of the proceeds of the

bonds could not possibly be one of the "preliminary requisites for the issue of" the bonds, for the bonds must issue before they could be sold to yield proceeds; nor could the location and construction of the road be one of such "preliminary requisites for the issue of" the bonds, the proceeds of which are to be invested in such construction. The doctrine of the Kentucky Court is, therefore, thus susceptible of a *reductio ad absurdum*.

The county officers issuing the bonds understood the situation better than the Kentucky Court, for they realized that the proceeds could not be expended, nor invested in the construction of the railroad before the bonds were sold, and that for the same reason the bonds could not recite such investment of the proceeds or construction of the railroad. A recital in the bonds of such investment of the proceeds would mean nothing to the purchasers of the bonds except a misrepresentation. To represent to the purchaser by a recital in the bonds that the price which he was about to pay had already been invested in the construction of the road in the county would be *felo de se*. We must, therefore, conclude that the doctrine of the Kentucky Court, while eminently pertinent to some cases, is totally inapplicable to this. It may be helpful to advise intending purchasers that conditions precedent have been performed, but it can effect no good to misrepresent as done what could not possibly have been done.

The Kentucky Court lays stress upon these concluding words of the order of June 17, 1869, *viz.*: "Conditioned and to be paid, as above stated," and these words of the order of October 12, 1871, "The same to be conditioned as specified in the order submitting the vote of the said county." The language quoted is entitled to no such effect as

is attributed thereto, for the language in the order of June 17, 1869, simply refers to what had been previously specified particularly in the order, and constituted no provision that the subscription should only be paid upon performance of the conditions, and the language quoted from the order of October 12, 1871 makes no provision for reciting the conditions in the bond, but had provision for such recitals been made they could not have varied the effect of the order of June 17, 1869, upon which the taxpayers voted. Indeed to have expressed in the bonds the conditions "specified in the order submitting the vote," would not have made the expenditure of the proceeds, nor the construction of the railroad through the county, conditions precedent to the issuance of the bonds, but the recitals in the bonds would have meant nothing more than the provisions in the order, *viz.:* That the railroad company should invest the proceeds of the bonds in the county and should construct the road through the county. The recital would not have imposed upon the bondholder buying the bond and paying his money the obligation to guarantee the proper investment of the proceeds by the railroad company. There is no provision in the order, or elsewhere, for such obligation upon the bondholder, and no intent expressed in the order submitting the vote that the bondholder should ever incur such unnatural obligation. The language of the order of October 12, 1871, could not refer to the exoneration from the previous subscription to the old railroad company, because the very issuance of the bonds presupposed the existence of such exoneration, the order of June 17, 1869 having provided "said bonds shall not be issued or said county pay any part of the principal or interest" "until said county of Green is fully and completely exonerated," *etc.*, from the previous subscription.

The bonds were issued in payment for stock obtained, voted on, and retained by the county. They were issued to raise money to build a road in the county, and the proceeds of $150,000 of the bonds were so used. The railroad company was the county's instrument to purchase the road for the bonds, and it would be iniquitous to hold the bondholder sponsor for the acts of the county's chosen representative, the railroad company. A person issuing notes to another whereon to raise money to be invested in property for the maker will not be heard to repudiate obligation upon the notes upon the ground that the agent entrusted to raise and expend the money had failed to expend all the money as required, and had failed to purchase with the money as much property as he had agreed to purchase. Cases involving the principle in point are, *Waggoner vs. German-American Title Co. 22 K. L. R. 215, 56 S. W. 961, and Cunningham vs. Potter, 23 K. L. R. 847, 64 S. W. 493*, where the makers of non-negotiable notes issued with the intention that the payees should raise money thereon, were held liable.

The enunciations of this court in *Coloma vs. Eaves, 92 U. S. 484, 486*, are very instructive in this connection, viz.: "At the outset, it is to be observed that the question is not between the town and its own agents; it is rather between the town and a person claiming through the action of its agents. The rights of the town as against its agents may be very different from its rights as against parties who have honestly dealt with its agents as such, on the faith of their apparent authority."

Again, *p. 487*,

"Is the ascertainment of these things (preliminary conditions) to be before the subscription is made, and

before the bonds are issued? Or must it be after the bonds have been sold, and be renewed every time a claim is made for the payment of a bond or a coupon? The latter appears to us inconsistent with any reasonable construction of the statute. Its avowed purpose was to aid the building of the railroad by placing in the hands of the railroad company the bonds of assenting municipalities. These bonds were intended for sale; and it was rationally to be expected that they would be put upon distant markets. It must have been considered that, the higher the price obtained for them, the more advantageous would it be for the company, and for the cities and towns which gave the bonds in exchange for capital stock. Everything that tended to depress the market value was adverse to the object the legislature had in view." * * * "Imposing such an obligation upon the purchasers would tend to defeat the primary purpose the legislature had in view; namely, aid in the construction of the road," etc.

Likewise, the situation which this court in *Graves vs. Saline County, 161 U. S. 360, 370*, quoted from the opinion in *Insurance Company vs. Bruce, 105 U. S. 328*, is suggestive in the instant case, viz.:

"The officers, both of the town and of the railroad company, knew, however, that bonds could not be negotiated in the market had their recitals disclosed the fact that payment depended upon conditions thereafter to be fulfilled by the railroad company. To the end, therefore, that money might be raised for the construction of the proposed road, or in reliance upon the performance by the railroad company of the conditions imposed, the con-

stituted authorities of the town, and the officers or agents of the company, co-operated in putting out bonds negotiable in form, and with recitals that gave no intimation even that the subscription was conditional."

In the case last quoted the court considered such stock subscriptions made in the case where there was a total want of power in the municipality, in the case where the power existed but subject to conditions prescribed by the Legislature, and in the case where the municipality was empowered to subscribe with or without conditions, as it might think proper, which is the instant case. In such a case, said the court, the municipal principal may waive its self-imposed conditions.

In the case at bar the municipality could subscribe with or without conditions as it thought fit. In fact, it imposed a condition precedent and required an agreement from the railroad company.

The condition precedent was the exoneration of the county, not from a subscription to the Elizabethtown & Tennessee Railroad—no such subscription had been made—but from "the payment of the capital stock voted by said county and *authorized to be subscribed*," etc. As has been seen, Green County was exonerated from the payment of the Elizabethtown & Tennessee stock, if it had ever been liable therefor, by the judgment of the Kentucky Court of Appeals in the Mercer County case. This took place after the order was made, but, in strict accordance with its terms, before the bonds were issued.

The other provision of the order, submitting the question of subscription to the vote of the people, was not a condition precedent, as the difference in its form clearly shows. It was

not a condition at all in the technical meaning of that word. It was the requirement of an agreement by the railroad Company with regard to the location of its road and the expenditure of the proceeds of the bonds subscribed.

The condition precedent having been performed, the officers of the municipality so determined, issued the bonds in payment of the county's subscription, and the company accepted the contract by accepting the bonds.

As to bonds issued under these circumstances Green County has no right to object either that there was no formal exoneration executed by deed, or that the railroad company has failed to carry out its agreement entirely.

It follows that both of the questions certified should be answered in the affirmative.

Respectfully,

EDMUND F. TRABUE,
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For Plaintiff in Error.

JOHN J. MCHENRY,
JOHN C. DOOLAN,
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NO. 213.

Supreme Court of the United States,

OCTOBER TERM, 1906.

MARY AMIS QUINLAN, Executrix,

vs.

GREEN COUNTY, KENTUCKY.

BRIEF OF ARGUMENT FOR GREEN COUNTY.

ERNEST MACPHERSON,
JOHN W. LEWIS,
Counsel for Green County.

Supreme Court of the United States,

October Term, 1906.

NO. 213.

MARY AMIS QUINLAN, Executrix,

vs.

GREEN COUNTY, KENTUCKY.

Brief of Argument for Defendant, Green County.

May it please the Court:

This case comes by a certificate from the United States Circuit Court of Appeals for the Sixth Circuit, certifying to this court certain questions of law for its decision in an action brought by plaintiff's testator, L. G. Quinlan, in the Circuit Court of the United States for the Western District of Kentucky against Green County, Kentucky, to recover on certain bonds and coupons purporting to have been issued by that county in aid of the old Cumberland & Ohio Railroad Company. In the circuit court, whose decision was in favor of the county, the issues were submitted to the court whose findings of law and fact, with the questions propounded by the circuit court of appeals, constitute the record here.

The facts and questions of law will be better understood by considering them in connection with the provisions of the charters or statutes authorizing the county subscriptions and governing the issuance of bonds.

The Elizabethtown & Tennessee Railroad Company was incorporated by an act of the General Assembly of the Commonwealth of Kentucky, approved February 19, 1868 (Acts, 1867-8, vol. 1, p. 560). Thereafter (Record, page 5), this order was entered in the Green County Court:

"1868, Green County Court, May called term 1868, 20th day of May, present T. R. Barnett, judge.

"This day, T. R. Barnett, presiding judge, aand D. T. Towles, clerk of the Green County Court, this day produced their certificate in words and figures as follows, viz.:

"We, T. R. Barnett, presiding judge, and D. T. Towles, clerk of the Green County Court, duly authorized to compare the poll books of Green county, certify that at an election held in said county at the various voting places in said county on the 16th day of May, 1868, on the question whether the county of Green shall, for and on behalf of said county, subscribe for three thousand shares in capital stock of Elizabethtown & Tennessee Railroad Co., to be paid for in the bonds of said county, payable in twenty years and bearing six per cent. interest, payable semi-annually, in the city of New York with interest coupons attached thereto, and that 586 votes were cast for said subscription and 204 against said subscription. May 20, 1868.

"T. R. BARNETT,
"D. T. TOWLES.

"It is therefore ordered by the court that the said vote be and is now entered of record, as follows, to-wit: 585 votes cast for said subscription and 204 votes were cast against said subscription, showing that there is a majority for said subscription of three hundred and eighty-two votes.

"It is now, therefore, ordered that the clerk of this court, for and on behalf of the county of Green, make said subscription on the terms specified in the order submitting the question to a vote as aforesaid."

The Cumberland & Ohio Railroad Company was incorporated by an act of the General Assembly of Kentucky, approved February 24, 1869. (1 Ky. Sess. Acts 1869, p. 463, C. 1578.) So much of this statute as is deemed necessary is printed at length as Appendix A to this brief.

This company was authorized by section 12 of the charter to construct and operate a railroad from the Ohio river through the counties of Henry, Shelby, Washington, Nelson, Marion, Taylor, Green, Barren and Allen, to a point on the boundary line between the States of Kentucky and Tennessee, "to be selected by the president and directors, about due north from the town of Murfreesboro, Tennessee, with a view of connecting with the Southern systems of railways converging at Nashville, Tennessee."

By section 15, any city, town or county through which the proposed road should pass was authorized to subscribe stock in the railroad company in any amount such munici-

pality desired, and to issue bonds therefor, payable to bearer, with coupons attached, bearing interest not exceeding six per centum per annum, payable in the city of New York, at not more than thirty years from date; but before any such subscription should be valid, the question of making it was required to be submitted to the qualified voters of the municipality, and a majority of the qualified voters voting at the election must be in favor of the subscription.

By section 16, the Cumberland & Ohio Railroad Company was given "all the powers and privileges conferred on the Louisville & Nashville Railroad by its charter," and by section 6 of the act of 1856, amending the charter of the road last named, counties or cities were empowered to subscribe for stock "*with such terms and time of payment, conditions annexed, and kind of payment that may be set forth in the subscription.*" By section 18, it was required of the Cumberland & Ohio Company that "they shall begin work on their road, in good faith, within three years, and complete the same within ten years from the passage of this act, or forfeit the powers and franchises herein conferred."

At its June term, 1869, commissioners representing the Cumberland & Ohio Company made to the Green County Court a proposition for a conditional subscription to its capital stock, to be paid in conditional bonds of the county. The proposition reads: "We, the undersigned, commissioners of the Cumberland & Ohio Railroad Company, hereby request that the county court of Green county submit to a vote of the qualified voters of said county the question, Whether said court shall subscribe for and on behalf of said county, and in pursuance of the provisions of the charter of said railroad company, two hundred and fifty thousand dollars to the capital stock of said company, *payable in the bonds* of said county, having twenty years to run and bearing six per cent. interest from date, *upon the condition* that said company shall locate and construct said railroad through Green county and within one mile of the town of Greensburg in the said county, and shall expend the amount so subscribed within the limits of Green county; and also upon the further conditions that said bonds shall not be issued, or said county pay any part of either principal or interest on said amount subscribed as aforesaid until said county of Green shall be fully and completely

exonerated from the payment of the capital stock subscribed for by the county court of said county for and on behalf of said county to the Elizabethtown & Tennessee Railroad Company." (Record, p. 1.)

On the same day, the county judge entered an order submitting to a vote of the people a proposition for a conditional subscription and liability, "conditioned and to be paid as above stated." (Record, p. 2.)

The vote at the election was in favor of the subscription, and it was "made with the conditions set out in the order of this court, ordering said election and now of record in the office of the county." (Record, pp. 2 and 3.)

At the October term, twelfth day, 1871, this order was entered: "On motion of E. H. Hobson, director of the Cumberland & Ohio Railroad, it is ordered that Z. F. Smith, president of the Cumberland & Ohio Railroad, be, and he is hereby authorized to have printed for the county of Green the bonds to the amount of two hundred and fifty thousand dollars, the amount of the subscription of Green county to the said railroad, in the following denominations, to-wit, *the same to be conditioned as specified in the order submitting the vote of the said county;*

125 bonds at $1,000.00	$125,000
200 bonds at $500.00	100,000
250 bonds at $100.00	25,000
	$250,000

(Record, p. 3.)

Although there had been no release from the first subscription (Record, p. 5), the bonds were ordered to be issued and were delivered. (Record, p. 3.) The bonds were in the form of promissory notes payable to the holder, with a seal attached, but contained no conditions, as ordered, no mention of the orders of court or charter of the company and no recitals whatever. They read, except as to numbers and amounts, as follows:

"No. 89. UNITED STATES OF AMERICA,
"COUNTY OF GREEN,
"STATE OF KENTUCKY,

$500.00.

"FOR THE CUMBERLAND & OHIO RAILROAD.

"Twenty years after date, the county of Green, in the State of Kentucky, will pay the holder of this bond the sum of five hundred dollars with interest thereon at the rate of six per cent. per annum, payable semi-annually, upon presentation of the proper coupons hereto attached, the principal and interest being payable at the Bank of America in the city of New York. In testimony whereof the judge of said county of Green has hereunto set his hand and affixed the seal of said county on the first day of April, A. D., 1871, and caused the same to be attested by the county clerk, who has also signed the coupons hereto attached. T. R. BARNETT, Judge.
(Green County Seal.) D. T. TOWLES, Clerk.'

(Record, p. 4.)

The court also found (Record, p. 3) that the county received and has ever since owned stock certificates of the railroad company, but did not find that the county had ever participated as stockholder or otherwise in the proceedings or meetings of the road.

By findings 10, 11 and 12 (Record, pp. 3 and 4), it is disclosed that only $150,000 of the bonds, "*or the proceeds thereof*," were expended within the county; that while the proposed line of the railroad was located through the county and within one mile of the town of Greensburg, yet that only about five miles (the answer, undenied, alleged specifically "four and one-fifth miles") of the twenty miles through the county were ever constructed, or attempted to be constructed, in Green county; that only grading, bridging or tunneling was ever done over "about five miles" by the Cumberland & Ohio Railroad Company, and that the rails, ties and superstructure generally over this small portion were completed by the Louisville & Nashville Railroad,

not with any of the bonds of the county, but "at its own expense" under its lease with the "Southern Division of the Cumberland & Ohio Railroad Company."

Before the expiration of its charter (1879), when it ceased to exist, the Cumberland & Ohio Railroad Company abandoned the enterprise and adopted an amendment to its charter, by which amendment the original road was abandoned and the company was divided into two "distinct corporations," one of which, "the Southern Division of the Cumberland & Ohio Railroad Company," was "to own the section of said road situate between Lebanon, in Marion county, and Greensburg, in Green county;" "each to have the powers conferred" by this act upon the Cumberland & Ohio Railroad Company "so far as applicable to their respective sections." The amendment was careful to preserve the defenses of the counties which in any way were affected by the abandonment by the Cumberland & Ohio Railroad Company of its enterprise, and enacted, in section 10, that "nothing herein shall be construed to affect the validity or any legal question connected with the bonds of any of the counties along the line of the road."

Sections 6 and 10 of the amendment are printed as Appendix B.

The court found (Record, p. 5) "that the plaintiff knew when he purchased the bonds sued on that the railroad had not been constructed in Green county, otherwise than as herein found to be the fact, namely, from the northern line of said county to the town of Greensburg, but no farther."

The court found that none of the conditions of subscription had been fulfilled and gave judgment for the county.

The questions of law certified are, 1st: "Do the facts found by the circuit court conclude or estop the county from denying liability to the plaintiff upon the bonds and coupons in suit, by reason of non-compliance with the terms and conditions imposed by the favorable vote of the county authorizing a subscription to the stock of the Cumberland & Ohio Railroad Company and the issuance of bonds in payment therefor? Or, if this question be deemed too broad, then, 2d: Assuming the facts to be as found, was a *bona fide* purchaser before maturity of these bonds and coupons for value entitled to assume in his purchase that Green county had before their issuance been "fully and completely

exonerated from the payment of the capital stock subscribed for by the county court of said county for and in behalf of said county to the Elizabethtown & Tennessee Railroad Company?"

It is claimed by the county that both questions should be answered in the negative.

ARGUMENT.

I.

The purchaser of municipal bonds is bound to take notice of the law under which the obligations are issued. This is the settled law in the Federal courts.

In Barnett v. Denison, 145 U. S., 139, often reaffirmed, the supreme court said:

> "It is the well-settled doctrine of this court that municipal corporations are merely agents of the State government for local purposes, and possess only such powers as are expressly given, or implied, because essential to carry into effect such as are expressly granted; 1 Dill. Mun. Corp., sec. 89; Ottawa v. Casey, 108 U. S., 110; that the bonds of such corporation are void unless there be express or implied authority to issue them; Wells v. Supervisors, 102 U. S., 625; Claiborne County v. Brooks, 111 U. S., 400; Conroid v. Robinson, 121 U. S., 165; Kelley v. Milan, 127 U. S., 139; that the provisions of the statute authorizing them must be strictly pursued; and that the purchaser or holder of such bonds is chargeable with notice of the requirements of the law under which they are issued."

II.

The purchaser of the papers herein involved knew that by the terms of the charter of the Cumberland & Ohio Railroad conditional subscriptions to its corporate stock were valid.

At its summer term, 1871, before the bonds herein sued

on were ever issued, or even printed, the Kentucky Court of Appeals construed the charter (statute) of the Cumberland & Ohio Railroad Company and held valid conditional subscriptions to its stock, and that subscribers might provide for any sort of payment they might choose. The court, in Shelby County Court v. C. & O. R. R. Co., 8 Bush, 216, said:

> "But we are not required to decide as to the legal effects of each of the several conditions on the assumption that they were added to the main proposition submitted without authority of law. The president and directors of the railroad company are not only expressly vested by the 12th section of the act of 1869, *supra*, with all the powers and rights necessary to the construction of the road, but the 16th section provides that the company 'shall have all the powers and privileges conferred on the Louisville & Nashville Railroad Company by the laws of Kentucky for constructing and operating their said road not herein specified and granted, and not in conflict with the terms of this charter,' and by section 22 of the charter of the Louisville & Nashville Railroad Company the county courts of counties through which the road passes are expressly authorized to submit to the voters of their counties propositions for subscribing for stock in that corporation, 'if by them deemed expedient, in such manner as they may direct and prescribe.' And by the 6th section of an act to amend the same charter, approved January 17, 1856, counties, towns, cities and other corporations are authorized, in express terms, to subscribe for stock in that road, '*with such terms and time of payment, conditions annexed, and kind of payment, that may be set forth in the subscription.*'"
>
> "After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself." Mr. Chief Justice Waite in Douglass v. Pike Co., 101 U. S., 687.

This decision of the highest court of the State, rendered before the bonds were ever issued, construing a statute of the State, should have weight in any court.

So far from changing its views of this statute or charter of the Cumberland & Ohio Railroad, the Court of Appeals of Kentucky reaffirmel its conclusions in the Shelby county case, as incidental to its ruling in Green County v. Shortell, 116 Ky., 108, that the bonds of this county are void.

The decision in the Shortell case was fully considered, was the unanimous opinion of the Kentucky Court of Appeals, was decided in accordance with the principles repeatedly announced by this court; and, of the many cases in relation to municipal bonds decided by the highest court in Kentucky, is the only one in which that court held as invalid any municipal bond after it had been issued by a municipality or its representatives.

III.

In the absence of a recital in a municipal bond or coupon that the conditions essential to its validity have been performed, it is open to the municipality to show the non-performance of the conditions.

The supreme court, in Citizens' Saving Association v. Perry County, 156 U. S., 701, said:

> "But it is urged that the bonds having been executed and issued by those whose duty it was to execute and issue them whenever that could be rightfully done, the county is estopped to plead their invalidity as between it and the *bona fide* purchaser for value. This argument would have force if the material circumstances bringing the bonds within the authority given by law were recited in them. In such a case, according to the settled doctrines of this court, the county would be estopped to deny the truth of the recital as against *bona fide* holders for value. But this court, in Buchanan v. Litchfield, 102 U. S., 292, upon full consideration, held that the mere fact that the bonds were issued without any recital of the circumstances bringing them within

> the power granted, was not in itself conclusive proof, in favor of a *bona fide* holder, that the circumstances existed which authorized them to be issued."

In Town of Coloma v. Eaves, 92 U. S., 481, Justice Bradley, in his concurring opinion, said:

> "But a mere execution and issue of the bonds without such recital is not, in my judgment, conclusive. It may be *prima facie* sufficient, but the contrary may be shown. This seems to me to be the true distinction to be taken on the subject, and I do not think that the contrary has even been decided by this court. There have been various *dicta* to the contrary, but the cases, when carefully examined, will be found to have had all the prerequisites necessary to sustain the bond, according to my view of the case."

The case of Provident Life & Trust Company v. County of Mercer, 170 U. S., 593, reaffirmed this doctrine. There, page 601, the court, although sustaining the bonds which recited a compliance with the conditions, used this language:

> "By a long series of decisions such recitals are held conclusive in favor of a *bona fide* holder of bonds that precedent conditions prescribed by statute and subject to the determination of those county officers have been fully complied with. For instance, whether an election has been held, whether at such an election a majority voted in favor of the issue of bonds, whether the terms of the subscription have been complied with, and matters of a kindred nature which either expressly or by necessary implication are to be determined in the first instance by the officers of the county, will, in favor of a *bona fide* holder, be conclusively presumed to have been fully performed, *provided the bonds contain recitals similar to those in the bonds before us.*" (Italics ours.)

In Carroll County v. Smith, 111 U. S., 556, Justice Matthews said:

> "They do not embody even a general statement that the bonds were issued in pursuance of the statutes referred to. The utmost effect that can be given to them is that of a statement that a subscription to the capital stock of the railroad company was authorized by the statutes mentioned, and that the sum mentioned in the bonds was part of it. They serve simply to point out the particular laws under which the transaction may lawfully have taken place. They say nothing whatever as to any compliance with the requirements of the statute in respect to which the board of supervisors were authorized and appointed to determine and certify. They do not, therefore, within the rule of decision acted on by this court, constitute an estoppel which prevents inquiry into the alleged invalidity of the bonds."

Mr. Justice Harlan, for the court, in School District v. Stone, 106 U. S., 183-187, concerning the construction of words in a bond claimed to operate as a recital estopping a municipality from showing that the bonds had been issued in violation of law, said:

> "Numerous cases have been determined in this court in which we have said that where a statute confers power upon a municipal corporation, upon the performance of certain precedent conditions, to execute bonds in aid of the construction of a railroad, or for other like purposes, and imposes upon certain officers, invested with authority to determine whether such conditions have been performed, the responsibility of issuing them when such conditions have been complied with, recitals by such officers that the bonds have been issued 'in pursuance of,' or 'in conformity with,' or 'by virtue of,' or 'by authority of' the statute, have been held, in favor of *bona fide* purchasers for value, to import full compliance with the statute, and to preclude inquiry as to whether the precedent conditions had been performed before the bonds were issued. But in all such cases, as a careful examination will show, the recitals fairly import a compliance, in all substantial

respects, with the statute giving authority to issue the bonds. *We are unwilling to enlarge or extend the rule now established by numerous decisions. Sound policy forbids it.*" (Our italics.)

In Hopper v. Town of Covington, 118 U. S., 148, Bk. 30, L. Ed., 192, Mr. Justice Gray said:

"The bonds in suit containing no statement of the purpose for which they were issued, and no recital which can bind the town by way of estoppel, any one suing upon the bonds is *bound to allege and prove the authority of the town to issue them.* (Italics ours.)

"The plaintiff relies on the statement of Mr. Justice Swayne, in Gelpcke v. Dubuque, 1 Wall., 175, 203 (68 U. S., Bk. 11, L. Ed., 520, 524), repeated by him and by Mr. Justice Clifford in later cases, that 'When a corporation has power under any circumstances to issue negotiable securities, the *bona fide* holder has a right to presume they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper.'

"But the circumstances thus spoken of were the preliminary facts requisite to the exercise of the power, not the limits, fixed by law, of the objects and purposes for which the power could be exercised at all. In each of the cases cited, e defects suggested were in the requisite preliminary proceedings, and the bonds sued on appeared by recitals on their face to have been issed according to law. When the law confers no authority to issue the bonds in question, the mere fact of their issue can not bind the town to pay them, even to a purchaser before maturity and for value."

The Court of Appeals of Kentucky, in holding valid and enforceable bonds of the town of Eminence issued in aid of the Cumberland & Ohio Railroad, attached much importance to the recitals therein:

> "In the present case, one of the officers, whose duty it was to superintend the election, signed the bonds and they present upon their face to the innocent purchaser *a statement which* (our italics), if he believed, would cause him to understand that those in authority as officers of the town of Eminence had decided that the bonds had been issued according to law; for those officers *expressly told* all who might read and wished to buy the bonds that they were issued for the railroad company, whose charter clearly authorized their issuance, and that the property and credit of the town of Eminence were pledged for their payment, which meant, if it meant anything, that the preliminary proceedings, provable *in pais*, were regularly taken before the bonds were issued." Town of Eminence v. Graeser, 81 Ky., 54.

So it should seem that the Court of Appeals of Kentucky and the Federal courts are at one in their views of the effects of recitals on municipal bonds.

IV.

In the alleged bonds of Green county, there being no recitals, and no reference to the law or authority under which they were issued, it was the duty of every person dealing therein to look to the records of the Green County Court.

In Crow v. Oxford, 119 U. S., 222, L. Ed. Bk. 30, page 390, Mr. Justice Blatchford, speaking for the whole court, said:

> "Even though the plaintiff purchased the bonds and coupons, as the finding of facts says, 'before their maturity, for value, without actual notice of any defense to them, or of any defect or infirmity in the proceedings for issuing them,' he was, in the absence of such recitals in the bonds as would protect him, bound by the information open to him in the official records of the officers whose names were signed to the bonds."

Said Mr. Chief Justice Waite, in McClure v. Oxford, 94 U. S., 432, L. Ed. Bk. 24, page 129:

> "To be a *bona fide* holder, one must be himself a purchaser for value *without notice*, or the successor of one who was. Every man is chargeable with notice of that which the law requires him to know, and of that which, after being put upon inquiry, he might have ascertained by the exercise of reasonable diligence."

Judge Hainer, in his work on Municipal Securities, section 413, states as follows:

> "Where bonds purporting to have been issued by a municipality contain no recitals of an election, or of proceedings and orders of the municipality, but are mere naked promises to pay, every purchaser and holder of the securities is chargeable with notice of whatever appears upon the face of the records. If in such case it appears upon the face of the records that the commissioners had no authority to issue the bonds, the municipality could avail itself of that want of authority as a defense to an action even by a *bona fide* holder," citing many authorities.

Said the supreme court in Marsh v. Fulton County, 10 Wall., 683, Bk. 19, L. Ed., 1042:

> "But it is earnestly contended that the plaintiff was an innocent purchaser of the bonds without notice of their invalidity. If such were the fact, we do not perceive how it could affect the liability of the county of Fulton. This is not a case where the party executing the instruments possessed a general capacity to contract, and where the instruments might for such reason be taken without special inquiry into their validity. It is a case where the power to contract never existed—where the instruments might, with equal authority, have been issued by any other citizen of the county. It is a case, too, where the holder was bound to look to the action of

the officers of the county, and ascertain whether the law had been so far followed by them as to justify the issue of the bonds. The authority to contract must exist before any protection as an innocent purchaser can be claimed by the holder. This is the law, even as respects commercial paper alleged to have been issued under a delegated authority, and is stated in the case of Floyd's Acceptances. In speaking of notes and bills issued or accepted by an agent, acting under a general or special power, the court says: 'In each case, the person dealing with the agent, knowing that he acts only by virtue of a delegated power, must, at his peril, see that the paper on which he relies comes within the power under which the agent acts. And this applies to every person who takes the paper afterwards; for it is to be kept in mind that the protection which commercial usage throws around negotiable paper can not be used to establish the authority by which it was originally issued."

In Dixon County v. Field, 111 U. S., 360, Bk. 28, L. Ed., 363, it was stated as follows:

"So, if the fact necessary to the existence of the authority was by law to be ascertained, not officially by the officers charged with the execution of the power, but by reference to some express and definite record of a public character, then the true meaning of the law would be that the authority to act at all depended upon the actual objective existence of the requisite fact, as shown by the record, and not upon its ascertainment and determination by any one; and the consequence would necessarily follow that all persons claiming under the exercise of such a power might be put to proof of the fact made a condition of its lawfulness, notwithstanding any recitals in the instrument."

The supreme court again, in Merchants' Exch. Nat. Bank v. Bergen County, 115 U. S., 392, L. Ed., 29, 432, after reviewing the cases, said:

"In the bonds of Bergen county there are no recitals. The bank in taking them, was bound to ascertain whether or not they were authorized. Had it examined the register of the bonds issued to take up the matured bonds, which was a public record of the county and open to inspection, it would have learned that the bonds which it received were not of the number thus authorized. Content to rely upon the unsupported representations of Bogert, it can not now cast upon the county the consequences of its own mistake."

V.

It is thoroughly settled as principles of general commercial law that an agent of a municipal corporation must keep strictly within his powers of attorney at all times, and that the authority of a mere private agent acting under a power of attorney to execute commercial papers must always be rigidly construed.

"Public officers can not acquire authority by declaring that they have it. They can not thus shut the mouth of the public whom they represent. The officers and agents of private corporations, entrusted by them with the management of their own business and property, may estop their principals and subject them to the consequences of their unauthorized acts. But the body politic can not be thus silenced by the acts or declarations of its agents. If it could be, unbounded scope would be given to the peculations and frauds of public officers. I hold it to be a sound proposition, that no municipal or political body can be estopped by the acts or declarations of its officers from denying their authority to bind it." (Justice Bradley, in Chisholm v. Montgomery, 2 Woods, 584.)

"Although a private agent may bind his principal by acts in violation of his special instructions, if they are within the scope of a general authority, the rule is otherwise when applied to the acts of an

officer of a public corporation; the reason being that in the former case, the extent of the authority is necessarily known only to the principal and his agent, while in the latter it is a matter of record in the books of the corporation or the public laws." (Mayor and City Council of Baltimore v. Reynolds, 20 Maryland, 1; 83 Am. Dec., 535.)

"An agent appointed by a writing which defines and limits his authority is subject to its terms, and acts done by him not within the scope of the authority can not bind his principal, and a person who trades with such agent must examine for himself whether the agent is acting under written instructions, and the principal will not be bound because such agent is ignorant of their existence. It is his duty to inquire, when by his bargain or sale he expects to bind a third person." (Snow v. Warner, 10 Met. (Mass.), 136; Reese v. Medlock, 27 Texas, 120.)

"The power to make or indorse negotiable instruments must be expressly granted by the principal. A power so granted is subject to strict interpretation, and mst be performed in strict conformity with the terms thereof." (Eaton & Gilbert on Commercial Paper, page 81; see also Tiedeman on Commercial Paper, page 139.)

"An authority to make or indorse negotiable paper is subject to strict interpretation and must be strictly pursued, and the agent can not bind his principal by the execution or indorsement of paper differing in amount or time from that authorized. The power will be construed as extending only to paper executed or indorsed in the business of the principal and for his benefit." (Am. & Eng. Ency. of Law, 2d Ed., Vol. 1, page 1033.)

Judge Brewer, in Lewis v. Bourbon County Commissioners, 12 Kan., 216, said:

"Every one dealing with the commissioners or purchasing such securities must take notice of the law under which they act. . . . That these bonds

were negotiable paper does not alter the case. The law merchant does not make the act of an agent proof of his authority."

VI.

In Green County v. Shortell, 116 Ky., at page 126, applying the foregoing principles of law in considering the bonds of Green county, the Court of Appeals of Kentucky said:

> "When the bonds of Green county were offered upon the market, every person buying them was put upon notice that the counties of this State had no authority to issue bonds of this character by the general laws of the State, and that the bonds in question were not binding on the county unless issued by special legislative authority. It was, therefore, incumbent upon all before buying these bonds to learn by what authority they were issued. It was shown by the bonds that they were issued 'for the Cumberland & Ohio Railroad.' They were made payable to the holder. When the purchaser looked to the charter of the Cumberland & Ohio Railroad, he was informed by it that the county court could only issue the bonds of the county after the question of making the subscription had been submitted to the qualified voters and a majority of them had voted in favor of the subscription. He was also informed that the county might make a subscription on such conditions as it saw fit. There being nothing on the face of the bonds to advise him on these matters, it was incumbent on him, before buying paper which was invalid in the absence of express authority in the officials, to look to the record and see under what circumstances these bonds had come into existence. When he looked to the record of the Green County Court, which, under the act, he was bound to know would set forth the facts, he was apprised that the subscription was made upon the conditions that the company would locate and construct its rail-

road through Green county, and within one mile of the town of Greensburg, and would expend the amount so subscribed within the limits of Green county, and also upon the further condition that the bonds should not be issued, or the county pay any part of either principal or interest, until it was fully exonerated from the subscription to the Elizabethtown & Tennessee Railroad Company. He was also notified that in the order of the court under which the vote was taken it was expressly submitted whether the county would subscribe $250,000 to the capital stock of the Cumberland & Ohio Railroad, 'conditioned and to be paid as above stated,' and that in the order making the subscription it was stipulated, 'This subscription is made with the conditions set out in the order of this court ordering said election and now on record in the office of this county.' He was further notified that, in the order directing the bonds to be printed, it was provided, 'the same to be conditioned as specified in the order submitting the vote of the said county.' These orders of the county court were the authority under which the bonds were issued, and the only authority which the officers issuing them had. They plainly disclosed the fact not only that the subscription was conditional, but that it was 'to be paid as above stated,' and that the bonds were 'to be conditioned as specified in the order submitting the vote.' The county officials had no authority to issue a bond not conditioned as specified in the order submitting the vote, for the subscription was expressly conditioned, and only to be paid on condition. If the county officials had followed the order of the county court and issued bonds conditioned as specified in the order submitting the vote, the bonds, on their face, would have informed every purchaser of the conditions on which they were voted. But when the county officials neglected to do this and issued instead a naked promise to pay, without any recital of the authority under which it was issued, the purchaser was put upon enquiry as to their authority, and their want of authority is as available against

him as the facts pleaded would have been had they followed their authority and conditioned the bonds as specified in the order submitting the vote."

In the same case, at page 130, the court said:

"It is insisted, however, for appellee that, by the terms of the subscription, it was made upon the condition that the bonds should not be issued, or the county pay any part of either principal or interest of the amount subscribed, until the county was exonerated from the payment of its subscription to the Elizabethtown & Tennessee Railroad. It is urged that this part of the condition was made precedent to the issuing of the bonds, but that the rest of the condition, to the effect that the company should locate and construct its road through Green county or (and?) within one mile of the town of Greensburg, and expend the amount subscribed in Green county, was not made a condition precedent to the issue of the bonds, and therefore only an obligation was imposed upon the railroad company for the performance of which the county only looked to it. It is also insisted that it is shown by the record that the subscription to the Elizabethtown & Tennessee Railroad was void. We can not concur in either of these conclusions. The meaning of the contract, taken as a whole, is that the subscription is upon the condition that the company shall locate and construct its railroad through Green county and within one mile of Greensburg, and expend the amount subscribed in the limits of Green county; and the further condition is added that the bonds are not to be issued or anything paid on account of the subscription until the county is exonerated from its former subscription to the Elizabethtown & Tennessee Railroad. In other words, the bonds are not to be issued until this release is made, and, after the release is made, the bonds may be issued, but they are to be subject to the condition that the company should locate and construct its road as above set out."

As a matter of course, the railroad officials knew that these bonds were not in the form voted for by the people. Whether the omission by the railroad company to specify or recite the conditions in the bonds as printed and issued was with a fraudulent motive, or whether they designed to substitute for the obligation assumed by the county an unconditional and negotiable liability, the effort failed. The courts should enforce the contract the county or the people made and no other. Had the railroad officials printed the bonds in the form contracted for by the county, this suit would never have been brought. The plaintiff must have shown a compliance with the terms of the conditional obligation; and whoever took this paper did so knowing actually or presumably that it was issued by the county and could be enforced only in the courts of the county; that it was expressed in terms variant from the true contract as shown by the public records of the county; that the conditions of liability were never and might never be fulfilled, and that the bonds were illegally issued.

The county official who signed the papers never intended to bind the people otherwise than conditionally, for, had he intended to estop the county, he would have done so by some official act. It is certain that the railroad people at the time were fully cognizant of the effect of recitals, as is shown by the case of Town of Eminence v. Graeser, 81 Ky., 52, hereinbefore quoted.

The suggestion of our adversaries that judgment should go against the county on the theory that the bonds were issued, because necessary to be sold in order to build the road in the county, is without force and is made without due reflection. If the bonds were expected to be sold, there was to be the sale of a mere conditional obligation. It could not have been necessary to sell them in order to build the road, for the road was never built. It could not have been necessary to sell them in order "to expend the amount of the subscription" in Green county, for that was never done. It was argued below that a conditional bond could never have been contemplated, as such a bond would inevitably be sold at a discount. Is it shown or claimed that, according to the evidence in the circuit court, the bonds were not sold or delivered originally to contractors or others at less than their face value? Why should the bond

of a county that never made a default in any promise authorized by the people be sold or delivered to contractors or others at the time it was issued for less than par? If it be true that these papers sold for less than par, it goes to show that at the time they were first issued, those who obtained them knew that the liability of the county was absolutely contingent.

The proceedings of the people and officials of Green county did not contemplate the immediate issuance of the bonds. They were, according to the contract, not to be issued until the county had been fully and completely exonerated from its subscription to the Elizabethtown & Tennessee Road. Assuming, contrary to the record and to fact, that this exoneration was complete when the papers were issued, there were several other conditions. The condition was not that the "*proceeds* of the bonds" should be spent in Green county, but was that "the amount of the subscription" should be so expended. The bonds may have been sold for forty cents on the dollar, or less. Had the bonds been sold at par, and the entire proceeds, $250,000, been spent in the county in building the four and one-fifth miles, "about five miles" of road, still the obligations on the part of the road would not have been fulfilled. The contract required in addition that the road should run through the county, and within one mile of the town of Greensburg. For all this the county was to pay not only the principal of $250,000, but the interest also, making $550,000. The amount of the subscription, $250,000, or anything like that sum, was not expended in the county, and the road never ran through the county. The contract the people assumed was in every condition unfulfilled. The county never agreed to pay until all the conditions had been performed.

Would it be reasonable, according to law, or just under such circumstances, to hold a corporate promisor bound at any and all events to pay a mere conditional promise made in view of the facts disclosed herein, and more particularly a public corporation acting through a special agent under a specific and limited power of attorney, the terms of which had been disregarded?

The claim has been made that the county of Green should at all events be compelled to pay for so much of

the road as was built by any corporation in the county. This is not a suit for any proportional part of the coupons. No such action could be brought under any circumstances. The contract was an entirety. It would never be permitted to select on condition and allege its part performance, and reject other and more important agreements.

VIII.

The meaning of the word "through," and the case of Provident Life and Trust Company v. Mercer County, 170 U. S.

The word "through," as used in the order submitting the question of subscription to the people of Green county, meant, and was understood by the parties to mean, from end to end, or from side to side. The "act to incorporate the Cumberland & Ohio Railroad Company," Acts of 1869, vol. 1, pp. 463 and 474, provided in section 12 for the construction of a railroad

> "*from the Ohio river through* Henry county, Shelby county, Washington county, Nelson county, Marion county, Taylor county, *Green county,* Barren county, and Allen county, *to a point on the boundary line between the States of Kentucky and Tennessee,* to be selected by the president and directors, about due north from the town of Murfreesboro, Tennessee, with a view of connecting with the Southern system of railways converging at Nashville, Tennessee."

The order submitting the question to the people was, among other requisites, "upon condition that said company shall locate and construct said railroad *through* the county of Green, *and* within one mile of the town of Greensburg in said county." The road was not necessarily to run to Greensburg; it was sufficient if it ran within one mile of the town, but it must run through the county. This is what the order said, and what it was by the people necessarily understood to mean. The whole conditional contract "is to be taken together, and to have a reasonable construction, according to the intent of the parties." (People's Ferry Co. v. Balch, 74 Mass., 303, 312.) "We are to ascertain

what the parties understood and intended by this language, and may not deviate therefrom, whether that contract, as interpreted, be wise or unwise for either party." (Memphis, etc., Railway v. Thompson, 24 Kan., 170.)

What did the people of Green county intend and understand? When the eloquent orators and philanthropists who fathered the improvement addressed the good people of Brush Creek in Green county, who knew that the charter contemplated a railroad "from the Ohio river through" many counties, including Green, "to a point on the boundary line between the States of Kentucky and Tennessee," "with a view of connecting with the Southern system of railways converging at Nashville, Tennessee," can it be assumed that any one believed that the benefits and blessings of this great through line were to be effected by building only about five miles into Green county? Greensburg was not to be the terminus of the road. Had any such notion been hinted at the time, is it not certain that the subscription would never have been made? If the road were not intended to run through the county from end to end, why did the railroad company go to the trouble of so locating the line? (Finding, 10; Record, p. 3.) In approving the proposition of the commissioners, the language employed by the taxpayers shows that they contracted to pay for a road to run through Green county not only, but it must also run "within one mile of the town of Greensburg." Why affix the additional condition if it were understood that the road was necessarily to come to Greensburg? Promoters of railways are not usually distinguished for stinginess in the assertion of benefits to accrue from such enterprises. When they pictured to the people the completion of this great trunk line joining the Ohio river with the Southern system of railways converging at Nashville, Tennessee, and running through Green county, the distance of a mile only from so important an artery of commerce was no disadvantage to Greensburg, for it was doubtless explained that the inevitable effect of this proximity would be so to increase population and business as to cause the town to expand over the intervening territory. To run from Taylor county through Green county and within one mile of the town of Greensburg to Barren county would require a southwesterly direction covering at least twenty

miles; and no one at the time of the contract could have dreamed of any other route or that without the complete construction of so much of the Cumberland & Ohio road the conditions of subscription could be even substantially fulfilled.

In the argument below much stress was laid upon the case of Provident Life and Trust Company v. County of Mercer, 170 U. S., 593. The Mercer county case differs in all essential facts from the case of Green county and has no application herein, as an examination of the case will disclose. There, at page 606, the court said:

> "Another significant feature in this connection is that by statute the bonds were to be negotiable."

In the case at bar, the statute (charter) did not prescribe that the bonds should be negotiable; the word negotiable is nowhere used in the charter of the Cumberland & Ohio Railroad. Indeed, such a requirement would have been inconsistent with other provisions of that instrument. In the charter of the Louisville Southern Railroad Company, it was provided "that no such subscription shall be binding, unless such railroad shall pass to or through the corporate limits of the town of Harrodsburg." The road did pass to and through that town; and this court held that, under the charter itself, "the proviso is not that the road in passing through the county shall touch or pass through the town of Harrodsburg, but simply that it shall pass to or through that town, and either is sufficient." In our case the contract was that the road should be "located and constructed through Green county and within one mile of the town of Greensburg," not through Green county to or through a point within one mile of Greensburg.

In the Mercer county case the road was completed as to twenty miles, and through the entire county except as to two miles, and, by connecting with another road, ran through the county; the company was preparing to finish the road completely through the county, "but desisted because the trustees of the bonds, relying on the opinion of the members of the County Court of Claims, decided the contract fully complied with, and delivered the bonds, and the county received stock of the company in return, voted upon

it at stockholders' meetings, and has ever since retained it, and paid interest on the bonds." There was nothing like this in Green county. Moreover, the Mercer county bonds contained full recitals, and this fact was emphasized in the opinion as has already been shown under Subdivision III of this argument.

In the same case it is stated that the word "through" is sometimes equivalent to "within." But, whatever varieties of meaning may in different contexts attach to this word, as used by the people of Green county, it meant from side to side, and any other than this primary signification applied herein would be strained and unnatural.

If "through Green county" be equivalent to within Green county, the people must have contemplated a most expensive short railway. To run within Green county and within one mile of the town of Greensburg would require only about three miles of road.

Think for a moment what these three miles would cost. The interest on $250,000 for a year at 6 per centum per annum is $15,000. The interest for twenty years, the period for which the bonds were to run, is $300,000. The total amount to be paid by the county for the three miles was to be $550,000 if the bonds and coupons were all paid promptly at maturity—$183,333.33 1-3 per mile! This alleged contract is made by the taxpayers of a county the assessed value of whose property, as shown by the Auditor's reports, was about $900,000. Your Honors are asked by the other side to uphold and enforce this alleged contract against a people who agreed to be bound only if "said road should run through Green county *and* within one mile of the town of Greensburg." The alleged debt which the people never contracted amounted at the time this action was begun to more than $600,000.

IX.

The second question reads:

> "Assuming the facts to be as found, was a *bona fide* purchaser before maturity of these bonds and coupons for value, entitled to assume in his purchase that Green county had before their issuance been

'fully and completely exonerated from the payment of the capital stock subscribed for by the county court of said county for and in behalf of said county to the Elizabethtown & Tennessee Railroad Company?'"

It will not escape the attention of Your Honors that the circuit court did not in its finding (Record, p. 1) use the words "purchaser *before maturity*," nor did it find that the plaintiff, although a holder for value, was without notice.

If the question be intended to ask whether the bare fact that the bonds were signed and delivered by the county judge was a decision that there had been a full and complete exoneration from the liability on the subscription to the Elizabethtown & Tennessee Railroad, it should be answered in the negative. It has already been shown that "when the law confers no authority to issue the bonds in question, the mere fact of their issue can not bind the town to pay them, even to a purchaser before maturity and for value.". Hopper v. Town of Covington, 118 U. S., 148. It is certain that there was no such determination by any official of Green county; but had there been in the bond or in any record of court a certification of such release, it could not, unless showing some action by the Elizabethtown & Tennessee Railroad, have affected Green county, for it was not within the province of the county judge or the county alone to decide that question; that was a matter for the determination of the representatives of the railroad; a shareholder has no right of his own mere volition to nullify his subscription. The circuit court found as a fact that no formal release was ever made or attempted.

If the second question be intended to ask whether the order (Record, p. 5) in relation to the subscription to the Elizabethtown & Tennessee road was void, the answer should still be in the negative.

It is certain that the county court and the people and the representatives of the Cumberland & Ohio Railroad Company considered the county at the time as bound to the Elizabethtown & Tennessee Company, else why insert in the proposition of the Cumberland & Ohio commissioners any provision in respect of exoneration from a liability which did not exist? The vote of the people and orders

of the county judge assumed the existence of and ratified the previous subscription.

In Cook on Corporations, Vol. 1, section 52, page 157, it is said:

> "The contract of subscription for shares of stock in an incorporated company may be entered into in various ways. Whenever an intent to become a subscriber is manifested, the courts incline, without particular reference to formality, to hold that the contract of subscription subsists. It is, as in the case of other contracts, very much a question of intent. Formal rules are, for the most part, disregarded. And in general a contract of subscription may be made in any way in which other contracts may be made. Any agreement by which a person shows an intention to become a stockholder is sufficient to bind both him and the corporation."

Ibid, at page 240:

> "It has been held that in order to constitute a valid municipal subscription to the stock of a railway company, it is not necessary that there be an actual act of subscribing."

If this court should hold it was necessary to show that there had been an act of manual subscribing on the books of the company, it would be fatal to plaintiff's case, because the record nowhere shows such a proceeding in the subscription to the Cumberland & Ohio road.

It is further claimed that the order of subscription was void because it concluded with the words: "It is now, therefore, ordered that the clerk of this court, for and on behalf of the county of Green, make said subscription on the terms specified in the order submitting the question to a vote as aforesaid." The Kentucky Court of Appeals thus disposed of the contention in Green County v. Shortell, 116 Ky., 132:

> "It is insisted that the order is void, because the county court, instead of making the subscription,

delegated this duty to its clerk; and Mercer County Court v. Kentucky River Navigation Company, 71 Ky., 300, is relied on. But in that case the order of the county court appointing the commissioner to make the subscription contained these words: 'But said commissioner is directed not to subscribe said stock, or any part thereof, until said company shall, by proper orders entered on the books, agree that no part of their subscription shall be mortgaged under the provisions of the tenth section of the act of the Kentucky Legislature incorporating said company, nor shall the county of Mercer be in any manner bound for the subscription herein decreed to be made until said company has accepted it upon the conditions herein set forth.' It was held that the power of the county court to make the subscription, being conferred by law, must be exercised by it, and that it could not confer upon a commissioner the power to determine important questions submitted for its determination. The ground of the decision was that there was no subscription unless certain things were done, and the commissioner was to determine whether these things were done, and thus, by the exercise of his discretion, determine whether the subscription should be made, whereas the law had vested this discretion alone in the county court. But the case before us is wholly different. No discretion is conferred on the county clerk. He is simply directed absolutely to do a clerical act. County courts can not conveniently sign subscription papers or documents of this kind, and for convenience such bodies usually act by a commissioner or agent in the discharge of the mere clerical duty of signing such papers. Such a course of doing the business has been often sustained."

X.

It can not be claimed that the bonds will ever be validated by the completion of the contract, for the road as contemplated was abandoned years ago. The charter of the Cumberland & Ohio Railroad expired by its own terms

February 24, 1879 (Appendix A, section 18), and was never renewed. By the amendment to the act two small sections of the road, or rather uncompleted sections, were converted into distinct corporations. Section 6 (Appendix B) reads:

> "That the Cumberland & Ohio Railroad Company may be divided into two distinct corporations, with the approval of a majority of the stockholders voting at a regular or called meeting of the company. The one corporation to own the section of said road situate between Campbellsburg, in Henry county, and Bloomfield, in Nelson county, and to be composed of the stockholders north of Washington county, and to be known by the corporate name of the Northern Division of the Cumberland & Ohio Railroad Company; and the other to own the section of said road situate between Lebanon, in Marion county, and Greensburg, in Green county, and to be known by the corporate name of the Southern Division of the Cumberland & Ohio Railroad Company, and to be composed of the stockholders south of Washington county; and each to have the right to sue and be sued, and the powers conferred by this act upon the Cumberland & Ohio Railroad Company *so far as applicable to their respective sections.*"

All notion of building a railway "from the Ohio river" through the various counties, including Green, "to the Tennessee line" was given up forever. The Southern Division let its unfinished road to the Louisville & Nashville Railroad, placed a mortgage thereon at $15,000 a mile, and the latter road took hold of the right of way on which "the work on the railroad was (had been) suspended for some years," and "the rails and ties, and superstructure generally, were put upon the track theretofore graded, and the railway was completed from the northernmost line of the county to Greensburg, under the terms of its lease, by the Louisville & Nashville Railroad Company *at its own expense, and not with any of the bonds issued as aforesaid by the defendant.*" (Record, p. 4.)

The legislature must have known the conditions of the

contracts and bonds of counties in the original line as contemplated, and so we should expect their defenses and rights to be protected by the amendment of 1878. Some of the counties had never issued any bonds, and Green county had authorized only a conditional obligation, and section 10 of the amendment provided "that if any of the bonds or coupons of bonds of the counties of Allen, Barren or Washington have not been issued or sold, such bonds or coupons shall not be issued or sold to aid in the construction of the Cumberland & Ohio Railroad; but the same shall be and remain the property of the counties in whose names they were executed, and nothing herein shall be construed to affect the validity *or any legal question connected* with the bonds of *any of the counties* along the line of the road."

Our adversaries assert that Green county should pay the bonds and then sue the Cumberland & Ohio Railroad Company for damages. They do not, however, point out any method by which to bring before the court that corporation, which ceased to exist in the year 1879.

XI.

The fact that coupons for interest were for a few years paid, in no legal way estops the count to show the invalidity of the bonds or coupons, or the failure of the road to fulfill the conditions.

The record in this case does not show that Green county paid interest on the bonds illegally issued for two years by the same officials who issued the bonds, and also failed to incorporate in the bonds the conditions required by the contract, although it so appeared in the Shortell case.

In the recent case of Wilkes County Commissioners v. W. N. Coler & Co., 190 U. S., 113, L. Ed. Bk. 47, 973, Mr. Justice Harlan said:

> "The the qualified voters of Wilkes county gave their sanction to a subscription to the capital stock of the Northwestern North Carolina Railroad Company; that the bonds in suit are part of those

issued in payment of such subscription; that stock was issued to the county to the full amount subscribed; that the road desired by the people of the county was constructed and is in operation; *that for many years the county paid interest upon the bonds;* and that the plaintiff purchased the bonds in suit for value and in good faith; these propositions are not disputed. However strongly these facts appeal to every one's sense of right and justice, they do not estop the county from raising the question of its power to have made the subscription in question. We repeat what was said in the former opinion—indeed what had been held in many previous decisions—that, if there was an absolute want of power to issue the bonds in question, every purchaser of them was charged, in law, with notice of that fact, and could not look to the county in whose name they were issued. Such power could not be created by mere recitals in the bonds."

In Doon Tp. v. Cummins, 142 U. S., 366-376, Mr. Justice Gray said:

"A ratification can have no greater effect than a previous authority, and debts which neither the district nor its officers had any power to authorize or create can not be ratified or validated by either the payment of interest or otherwise."

The payment of interest on school bonds does not estop a school district from denying their validity where it is not shown that the officers and people of the district had full knowledge of the facts connected with the issuance and sale of the bonds. Ashuelot National Bank v. School District, 41 Fed., 514. See also State v. School District, 16 Nebraska, 182; 20 N. W. R., 209. The case of Graves v. Saline County, 161 U. S., at page 373, is pertinent here. Mr. Justice Shiras, speaking for the whole court, there said:

"While it is true that the mere exchange of new bonds for old ones and the payment of interest on

> the former by the county authorities would not estop the county from challenging the validity of the new as well as that of the old bonds, yet we think it was competent for the county, in such a state of facts as here existed, *by a vote of the people* (italics ours), to waive the condition attached to the original subscription and to estop itself from declining to be bound by the new negotiable securities."

And, further along in this opinion, the learned justice designates the only authority having power to waive conditions:

> "But where the municipality is empowered to subscribe with or without conditions as it may think fit, and where the conditions are such as it chooses to impose, there seems to be no good reason why it may not be competent for such municipality to waive such self-imposed conditions, *provided, of course,* (our italics) such waiver is by the municipality acting as the principal, and not by mere agents or official persons. Such was the case here. The subscription was made on condition that the railroad should be commenced within one year and completed within three years from date of the subscription, and, it may be, under the doctrine of Town of Eagle v. Kohn, 84 Ill., 292, that the action of the board of commissioners in extending the period for commencing and finishing the railroad would not relieve the company from the condition, nor avail to estop the county as against *bona fide* holders of the bonds."

In the Saline county case the bonds were upheld, because the same constituent body that authorized the original issue voted to issue refunding bonds; new negotiable bonds were executed, contained recitals that all requirements had been fully complied with; and in the meantime the road had been actually constructed. The real principals in the Green county bonds never waived any conditions. They levied no taxes and paid no interest. They are not estopped by anything that may have been done "by mere

agents or official persons" of the county. They promptly, upon discovering the fraud, denied any liability not contracted for.

Counsel for defendant ask that both questions presented by the Circuit Court of Appeals be answered in the negative.

Respectfully submitted,

ERNEST MACPHERSON,
JOHN W. LEWIS,
For Green County.

APPENDIX A.

An act to incorporate the Cumberland & Ohio Railroad Company Acts 1869, Vol. 1, p. 463:

Sec. 12. "That the president and directors of said company are hereby vested with all the powers and rights necessary to the construction of a railroad from the Ohio river through Henry county, Shelby county, Washington county, Nelson county, Marion county, Taylor county, Green county, Barren county and Allen county, to a point on the boundary line between the States of Kentucky and Tennessee, to be selected by the president and directors, about due north from the town of Murfreesboro, Tennessee, with the view of connecting with the Southern system of railways converging at Nashville, Tennessee."

Sec. 15. "That any city, town or county through which said proposed road shall pass is hereby authorized to subscribe stock in said railroad company in any amount any such city, town or county may desire; and the county court of any such county is authorized to issue the bonds of their respective counties in such amount as the county court may direct; and the chairman and board of trustees, or mayor and aldermen of any town, and the mayor and aldermen or council of any city, are hereby authorized to issue the bonds of their respective towns or cities in like manner. All said bonds shall be payable to bearer, with coupons attached, bearing any rate of interest not exceeding six per cent. per annum, payable semi-annually in the city of New York, payable at such times as they may designate not exceeding thirty years from date; but before any such subscription on the part of any city, town or county shall be valid or binding on the same, the mayor and aldermen, or chairman and board of trustees of any town, the mayor and aldermen or council of any city, and the county court of any county, having jurisdiction, shall submit the question of any such subscription to the qualified voters of such city, town or county

in which the proposed subscription is made, at such time or times as said chairman and board of trustees, or mayor and aldermen of any town, mayor and aldermen or council of any city, or the county court of any county, as aforesaid, may, by order, direct; and should a majority of the qualified voters voting at any such election vote in favor of subscribing said stock in said railroad company, it shall be the duty of such county court, trustees, or other authorities aforesaid, to make the subscription in the name of their respective cities, towns or counties, as the case may be, and proceed to have issued the bonds to the amount of such subscription as hereinbefore directed; and the mayor and aldermen, or chairman and board of trustees of any town, mayor and council or aldermen of any city, or the county court having jurisdiction in any such county that may subscribe for stock in said railroad company, are hereby authorized and required to levy annually and collect a tax upon the taxable property in their respective cities, towns or counties, as listed and taxed under the revenue laws of this State, a sum sufficient to pay the interest on said bonds as it accrues, together with the cost of collecting the same. They are also authorized and required to make provision for paying said bonds at their maturity; and to enable them to do this they may establish a sinking fund, and loan out the same at any rate of interest they can obtain, and, if necessary, collect the same by law, or may adopt such other means as to them may seem proper and expedient; and may levy and collect taxes annually or otherwise on the property aforesaid for this purpose. The person collecting said tax shall give tax receipts for the same; and any taxpayer paying tax to said road under the provisions of this act, shall be entitled to stock in said railroad company to the amount of taxes he may pay; and the cities, towns or counties, under whose subscription the tax is levied, shall be divested of stock to the extent of stock issued on said tax receipts; and whenever such receipts to the amount of one share or more shall be presented to

the company, or an officer or agent designated by it, a certificate of stock shall be issued for a fractional part of a share: *Provided,* That the said cities, towns or counties shall receive no dividends on their stock, but the holders of stock issued on said receipts as aforesaid shall be entitled to the same dividends and to all the rights and privileges as the original and cash stockholders. *And provided further,* That said company may, in any way that may seem expedient to it, provide for and pay, each or any year, to the cities, towns or counties, or any of them, the amount of tax levied by reason of said bonds, and thus stop the collection of tax for that year. *And provided further,* That the company may purchase said bonds and surrender them at any time to the cities, towns or counties issuing them, and have the same canceled; and the mayor and council or aldermen of any city, or the mayor and aldermen or chairman and board of trustees of any town, or the county court of any county having jurisdiction, may appoint collectors for said tax, or may require the sheriffs or marshals of the respective cities, towns or counties within the jurisdiction of same to collect the said tax, all of whom shall have the same powers and remedies, and shall proceed in the same way for the collection of said tax as the sheriffs in the collection of the State revenue. The mayor and aldermen, or chairman and board of trustees, shall require and take from the person collecting the tax a bond, with sufficient sureties, conditioned as they may think best. If the collections are made by the sheriff or marshal, they shall settle and pay over the tax at the same time that sheriffs are required to pay the State revenue, and for their services in collecting they shall in no case be allowed more than three per cent. commission on the amount collected. That, if preferred, the application herein authorized to be made to the county court may be made to the presiding judge of the county court; and all the powers herein given to the county court are hereby vested in the presiding judge of the county court. At all meetings of

the stockholders for the purpose of electing officers or any other purpose, the said town, cities and counties may, by proxies duly authorized by the authorities thereof, cast a vote for each share so subscribed by said town, city or county: *Provided,* That whenever certificates of stock shall be issued to persons residing therein for taxes paid, the stock represented by such certificate shall be deducted from the stock represented and voted for by said proxies; and said taxpayers shall be entitled to one vote for each certificate so issued to them representing one share of stock."

Sec. 18. "They (the Cumberland & Ohio Railroad Company) shall begin work on their road, in good faith, within three years, and complete the same within ten years from the passage of this act, or forfeit the powers and franchises herein conferred."

Section 16 of the charter closes with these words:

"And (the Cumberland & Ohio Railroad) shall have all the powers and privileges conferred upon said Louisville & Nashville Railroad Company by the laws of Kentucky for constructing and operating their said proposed railroad, not herein specified and granted, and not in conflict with the terms of this charter."

Subsection 6 of section 1 of "Act to amend the charter of the Louisville & Nashville Railroad Company," approved January 17, 1858 (1 Acts 1855-6, page 181), declares:

"That said railroad company may receive subscriptions of stock to their company by individuals, towns, cities, counties, or other corporations, whether payable in money or other things, with such terms and time of payment, conditions annexed, and kind of payment that may be set forth in the subscription," etc.

APPENDIX B.

Acts of Kentucky, 1878, Vol. 1, page 549, chapter 482: "An act to amend an act, entitled An act to incoporate the Cumberland & Ohio Railroad Company," approved February 24, 1869, became a law March 18, 1878.

Sec. 6. "That the Cumberland & Ohio Railroad Company may be divided into two distinct corporations, with the approval of a majority of the stockholders voting at a regular or called meeting of the company. The one corporation to own the section of said road situate between Campbellsburg, in Henry county, and Bloomfield, in Nelson county, and to be composed of the stockholders north of Washington county, and to be known by the corporate name of the Northern Division of the Cumberland & Ohio Railroad Company; and the other to own the section of said road situate between Lebanon, in Marion county, and Greensburg, in Green county; and to be known by the corporate name of the Southern Division of the Cumberland & Ohio Railroad Company, and to be composed of the stockholders south of Washington county; and each to have the right to sue and be sued, and the powers conferred by this act upon the Cumberland & Ohio Railroad Company so far as applicable to their respective sections."

Sec. 10. "That if any of the bonds or coupons of bonds of the counties of Allen, Barren or Washington have not been issued or sold, such bonds or coupons shall not be issued or sold to aid in the construction of the Cumberland & Ohio Railroad; but the same shall be and remain the property of the counties in whose names they were executed, and nothing herein shall be construed to affect the validity or any legal question connected with the bonds of any of the counties along the line of the road."

Supreme Court of the United States.

No. 213.—October Term, 1906.

Mary Amis Quinlan, Executrix, *vs.* Green County, Kentucky. } On a certificate from the United States Circuit Court of Appeals for the Sixth Circuit.

[April 8, 1907.]

Plaintiff in error brought an action in the Circuit Court of the United States for the Western District of Kentucky upon certain bonds and coupons purporting to have been issued by the defendant in error, one of the counties of the State of Kentucky. The following was the form of the bond:

"United States of America,
County of Green, State of Kentucky.
$500.00
For the Cumberland and Ohio Railroad.

"Twenty years after date, the county of Green, in the State of Kentucky, will pay to the holder of this bond the sum of five hundred dollars, with interest thereon at the rate of six per cent per annum, payable semi-annually upon presentation of the proper coupons hereto attached, the principal and interest being payable at the Bank of America, in the city of New York.

"In testimony whereof, the judge of said county of Green has hereunto set his hand and affixed the seal of said county, on the first day of April, A. D. 1871, and caused the same to be attested by the county clerk, who has also signed the coupons hereto attached.

(Green County Seal.)

T. R. Barnett, *Judge.*
D. T. Towles, *Clerk.*"

The case was tried without a jury, and the court, after finding facts, rendered judgment for the defendant. The case then went to the Court of Appeals for the Sixth Circuit, and that court has certified here two questions of law upon which it desires instructions, with a statement of facts upon which the questions arise. In addition to the statement of facts we take into account the material parts of the charter of the Cumberland and Ohio Railroad Company, section 15 of which contains the following provisions:

"Sec. 15. That any city, town or county through which said proposed road shall pass is hereby authorized to subscribe stock in said railroad company in any amount any such city, town or county may desire; and the county court of any such county is authorized to issue the bonds of their respective counties in such amount as the county court may direct; and the chairman and board of trustees, or mayor and aldermen of any

town, and the mayor and aldermen or council of any city, are hereby authorized to issue the bonds of their respective towns or cities in like manner. All said bonds shall be payable to bearer, with coupons attached, bearing any rate of interest not exceeding six per cent per annum, payable semi-annually in the city of New York, payable at such times as they may designate, not exceeding thirty years from date; but before any such subscription on the part of any city, town or county shall be valid or binding on the same, the mayor and aldermen, or chairman and board of trustees of any town, the mayor and aldermen or council of any city, and the county court of any county, having jurisdiction, shall submit the question of any such subscription to the qualified voters of such city, town or county in which the proposed subscription is made, at such time or times as said chairman and board of trustees, or mayor and aldermen of any town, mayor and aldermen or council of any city, or the county court of any county, as aforesaid, may, by order, direct; and should a majority of the qualified voters voting at any such election vote in favor of subscribing said stock in said railroad company, it shall be the duty of such county court, trustees, or other authorities aforesaid, to make the subscription in the name of their respective cities, towns or counties, as the case may be, and proceed to have issued the bonds to the amount of such subscription as hereinbefore directed;

* * * * * *

"That, if preferred, the application herein authorized to be made to the county court may be made to the presiding judge of the county court; and all the powers herein given to the county court are hereby vested in the presiding judge of the county court. At all meetings of the stockholders for the purpose of electing officers, or any other purpose, the said town, cities, and counties may, by proxies duly authorized by the authorities thereof, cast a vote for each share so subscribed by said town, city, or county. . . ."

The charter gives to the Cumberland and Ohio Railroad "all the powers and privileges conferred upon the Louisville and Nashville Railroad Company by the laws of Kentucky for constructing and operating their said proposed railroad." The charter of the Louisville and Nashville Railroad Company provides "that said railroad company may receive subscriptions of stock to their company by individuals, towns, cities, counties, or other corporations, whether payable in money or other things, with such terms and time of payment, conditions annexed, and kind of payment that may be set forth in the subscription." The commissioners of the Cumberland and Ohio Railroad requested the County Court to submit to the qualified voters of the county the question whether the county should subscribe to $250,000 of the capital stock of the company, payable in bonds of the county, whereupon the judge of the County Court on the 17th of June, 1869, ordered an election in the following terms:

"Whereas the commissioners of the Cumberland and Ohio Railroad Company, by virtue of the authority delegated to them by the charter of said company, have requested the County Court of Green County to order

an election in said county of Green, and to submit to the qualified voters of said county the question whether said county court shall subscribe for and on behalf of said county two hundred and fifty thousand dollars to the capital stock of the Cumberland and Ohio Railroad Company, and payable in the bonds of said county, having twenty years to run, and bearing six per cent interest from date, and upon condition that said company shall locate and construct said railroad through said county of Green, and within one mile of the town of Greenburg, in said county, and shall expend the amount so subscribed within the limits of Green County; and also upon the further condition that said bonds shall not be issued or said county pay any part of the principal or interest on said amount subscribed to said Cumberland and Ohio Railroad Company, until said county of of Green is fully and completely exonerated from the payment of the capital stock voted by said county, and authorized to be subscribed by said Green County Court to the Elizabethtown and Tennessee Railroad, or any part of the interest thereon. It is, therefore, ordered by the court that an election, by the qualified voters of Green County, at the voting places in said county, be held and conducted by the several officers, as prescribed by law, for holding elections on the third day of July, 1869, to vote on the question as to whether or not the said county court shall, for and on behalf of said county, subscribe two hundred and fifty thousand dollars to the capital stock of said Cumberland and Ohio Railroad, conditioned and to be paid as above stated."

The election was duly held July 3, 1869, and the vote was in the affirmative. During the year before this vote the voters of the county had voted in favor of a proposition to subscribe to the stock of the Elizabethtown and Tennessee Railroad, and thereupon the county judge had ordered the clerk of his court to make a subscription to the stock of the Elizabethtown and Tennessee Railroad Company, "on the terms specified in the order submitting the question to a vote." This was the subscription from which Green County desired to be exonerated before the Cumberland and Ohio Railroad bonds should be issued, or any part of their principal or interest paid. On June 3, 1870, the county judge entered an order reciting the election at which the qualified voters had approved the subscription to the capital stock of the Cumberland and Ohio Railroad, and concluding: "Now, therefore, I, Thomas R. Barnett, the presiding judge of the Green County Court, by virtue of the authority in me vested by law, and to carry out the wishes of said voters, do hereby subscribe for two hundred and fifty thousand dollars of the capital stock of said Cumberland and Ohio Railroad Company for and on benalf of said county of Green, which subscription is to be paid in the bonds of said county as prescribed in said order of submission, and this subscription is made with the conditions, set out in the order of this court, ordering said election and now of record in the office of this county."

At the April term, 1871, the Supreme Court of the State rendered a decision in the case of *Mercer* v. *Navigation Company*, 8 Bush, 300. It is

argued that this decision shows that the subscription to the stock of the Elizabethtown and Tennessee Railroad was void. However that may be, at a time which does not distinctly appear, but later than that decision, the judge of the County Court issued and delivered to the Cumberland and Ohio Railroad Company bonds of Green County to a small amount. On August 15, 1872, the judge in a formal order, reciting that application had been made for the issue of the balance of the bonds, directed that, "the court being sufficiently advised," they be signed and issued. Thereupon certificates of 2,500 shares of that stock of the par value of $100 per share were delivered to Green County, which has since held and owned them. It was conceded at the argument that the county had made payment of interest on the bonds thus issued to the Cumberland and Ohio Railroad. No formal or express exoneration of said county from the payment of the subscription to the stock of the Elizabethtown and Tennessee Railroad was ever made or attempted, but nothing further has, up to this date, ever been done in respect to it, and neither bonds by the county nor stock by the said last-named railroad company have ever been issued or delivered in execution of said orders or under the terms of said subscription. The proceeds of $150,000 of the bonds were expended within Green County in the partial construction of five miles of the road to Greensburg. This five miles was completed by a lessee at its own expense. Nothing else has been done within the county.

The plaintiff is the *bona fide* holder for value of the bonds and coupons in suit, but had notice that the railroad had not been laid further than Greensburg, and therefore did not extend "through" the county.

The questions certified by the Circuit Court of Appeals are:

"1st. Do the facts found by the Circuit Court conclude or estop the county from denying liability to the plaintiff upon the bonds and coupons in suit, by reason of non-compliance with the terms and conditions imposed by the favorable vote of the county authorizing a subscription to the stock of the Cumberland and Ohio Railroad Company and the issuance of bonds in payment therefor? or, if this question should be deemed too broad, then,

"2d. Assuming the facts to be as found, was a *bona fide* purchaser, before maturity of these bonds and coupons for value, entitled to assume in his purchase that Green County had before their issuance been 'fully and completely exonerated from the payment of the capital stock subscribed for by the County Court of said county for and in behalf of said county to the Elizabethtown and Tennessee Railroad Company?'"

Mr. Justice MOODY, after making the foregoing statement of facts, delivered the opinion of the Court.

The first question certified is thought by a majority of the court to contain more than a single question or proposition of law, and for that reason it is not answered.

The second question deals with the exoneration from subscription to the stock of the Elizabethtown and Tennessee Railroad Company which was made by the vote of the county a condition to the issue of the bonds, and we confine our consideration to that question and the facts relevant to it.

There is no doubt of the power of the defendant to issue the bonds. The legislature of Kentucky gave it in plain terms, upon the condition that its exercise receive the approval of the qualified voters. That approval was given upon the condition imposed by the vote that the bonds should not be issued before the county had been exonerated from a subscription to the stock of another railroad company. The law gave the county the right to impose conditions. This particular condition is a condition precedent to the lawful issue of the bonds, although it must not be understood that this statement applies to the other so-called conditions expressed in the vote. Of them nothing is intended to be said. If there had been a recital in the bonds which imported that the condition had been performed, that would have been conclusive in favor of a *bona fide* holder. *Provident Trust Co.* v. *Mercer County*, 170 U. S. 593; *Gunnison County Commissioners* v. *Rollins*, 173 U. S. 255. But there was no such recital in the body of these bonds, and the words of the heading, "For the Cumberland and Ohio Railroad," cannot be interpreted as such without going beyond the decided cases, which themselves have gone far. In the absence of a recital it is open to the defendant to show that the condition which it had a right to impose and did impose by the vote of its electors had not been complied with. *Citizens' Savings Association* v. *Perry County*, 156 U. S. 692. In other words, in the absence of a recital, the performance of the condition is not conclusively presumed.

But by the terms of the law it was the duty of the judge of the County Court, in whom the powers of the court were vested, to issue the bonds. After a favorable vote has been had in an election called by the court, the law provides that "it shall be the duty of said County Court . . . to make the subscription in the name of their . . . counties . . . and proceed to have issued the bonds to the amount of such subscription, as hereinbefore directed." This clearly placed upon the judge the duty and responsibility of ascertaining and determining whether the condition of the issue of the bonds had been complied with. *Coloma* v. *Eaves*, 92 U. S. 484.

If he had issued the bonds and they had contained in them recitals which fairly imported a compliance with the condition upon the happening of which their issue was authorized, they would have gone into the hands of innocent holders with a conclusive presumption that the condition had been performed. This principle has been announced by repeated decisions of this court and needs no other citations to support it than those already made. Without such recital the presumption is, as has been shown, not

conclusive. The further question arises, therefore, whether there is any presumption at all of the performance of the condition from the facts of subscription and issue. In the first case, dealing with this question, (*Knox County* v. *Aspinwall*, 21 How. 539,) it was said that a purchaser of such bonds had the right to assume that the condition of their issue had been complied with, merely from the facts of the subscription and issue. But in this case there was a recital, and subsequent cases have limited the adjudication to the precise point necessarily decided. *Citizens' Savings Association* v. *Perry County, ub. sup.* In *Supervisors* v. *Schenck*, 5 Wall. 772, it was said *obiter* by Mr. Justice Clifford, speaking of bonds of the kind under consideration, "the *bona fide* holder has a right to presume they were issued under the circumstances which give the requisite authority." The same dictum was in substance repeated by the same justice in *Lexington* v. *Butler*, 14 Wall. 282–296.

In *Pendleton County* v. *Amy*, 13 Wall. 297, it appeared that the county of Pendleton had issued bonds in aid of a railroad company. An act of the legislature gave the county the authority to issue the bonds, provided a majority of the real estate owners of the county should so vote. One of the pleas of the defendant in an action on the bonds was that they had never been authorized by the vote prescribed in the act which gave the power to issue them. This plea was demurred to, and the court passed upon the question thus raised. Mr. Justice Strong, in delivering the opinion of the court, said:

"If the right to subscribe be made dependent upon the result of a popular vote, the officers of the county must first determine whether the vote had been taken as directed by law, and what the vote was. When, therefore, they make a subscription, and issue county bonds in payment, it may fairly be presumed, in favor of an innocent purchaser of the bonds, that the condition which the law attaches to the exercise of the power has been fulfilled. To issue the bonds without the fulfilment of the precedent conditions would be a misdemeanor, and it is to be presumed that public officers act rightly. We do not say this is a conclusive presumption in all cases, but it has more than been once decided that a county may be estopped against asserting that the conditions attached to a grant of power were not fulfilled."

In this case there was no recital in the bond. It appeared by the pleadings that the bonds had been exchanged for the stock of the railroad company which was retained, and the decision was based upon the ground that the retention of the stock created an estoppel.

In the case of *Coloma* v. *Eaves*, 92 U. S. 484, the opinion of the court lends some countenance to the broad principle stated in *Knox* v. *Aspinwall*, but Mr. Justice Bradley, in a concurring opinion, said:

"I dissent from the opinion of the court in this case, so far as it may be construed to reaffirm the first point asserted in the case of *Knox County* v. *Aspinwall*, to wit, that the mere execution of a bond by officers charged with the duty of ascertaining whether a condition precedent has been performed is conclusive proof of its performance. If, when the law requires a vote of taxpayers before bonds can be issued, the supervisor of a township, or the judge of probate of a county, or other officer or magistrate, is the officer designated to ascertain whether such vote has been given, and is also the proper officer to execute, and who does execute, the bonds, and if the bonds themselves contain a statement or recital that such vote has been given, then the *bona fide* purchaser of the bonds need go back no farther. He has a right to rely on the statement as a determination of the question. But a mere execution and issue of the bonds without such recital is not, in my judgment, conclusive. It may be *prima facie* sufficient, but the contrary may be shown. This seems to me to be the true distinction to be taken on this subject; and I do not think that the contrary has ever been decided by this court."

These cases left it uncertain whether the court would give to the facts of subscription to stock and issue of bonds in payment therefor by officers charged with the duty of ascertaining whether conditions precedent had been complied with, the same conclusive effect as to the validity of the bonds which would exist when to those facts was added a recital in the bonds themselves. But the tendency, observable in the earlier cases, to deny to bonds in the hands of an innocent holder any other defense than a want of power of the maker was arrested by the cases of *Buchanan* v. *Litchfield*, 102 U. S. 278, and *Citizens' Savings Association* v. *Perry County*, *ub. sup.*, which held that the mere facts of the subscription to stock and issue of bonds containing no recital left it open to the obligor to show that a condition precedent had not been fulfilled. But these cases in no way conflict with the view expressed by Mr. Justice Strong in *Pendleton County* v. *Amy*, and by Mr. Justice Bradley in *Coloma* v. *Eaves*, that a presumption arises from the mere fact of subscription and issue, though not a conclusive one. Independent of authority such a presumption exists and is but an instance of the broader presumption that officers charged with the performance of a public duty perform it correctly. In the case at bar the judge of the County Court was charged with the duty of issuing the bonds upon the performance of the condition precedent. That condition was that the county should be "fully and completely exonerated from the payment of the capital stock voted by said company and authorized to be subscribed by said Green County Court to the Elizabethtown and Tennessee Railroad." The performance of that condition did not necessarily require any formal release or the execution of any paper whatever. It was completely fulfilled, if from any circumstance it should appear that the company had been effectively relieved from any liability on account of the vote in aid of the Elizabethtown and Tennessee Railroad. It

would be impossible for any purchaser of the bonds to ascertain whether this condition had been complied with, except by an inquiry which would naturally be made of the judge himself. The judge determined that it had been complied with, and the fact that for thirty-eight years no one has made any claim against the county on account of its supposed liability to subscribe to the stock of the Elizabethtown and Tennessee Railroad shows conclusively that he was right.

Construing the second question to inquire not whether there is conclusive presumption, but whether on the facts found there is any presumption at all that the ~~company~~ had been exonerated from its former subscription to another railroad, we answer it

Yes.

True copy.

Test:

Clerk Supreme Court U. S.